No. 10136

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. HOWARD EDGERTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT J. HOWARD EDGERTON.

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TOPICAL INDEX.

PAGE

PAGE

PAGE

TABLE OF AUTHORITIES CITED.

CASES. PAGE

STATUTES.

TEXTBOOKS.

INDEX TO APPENDIX.

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STATEMENT OF BASIS OF JURISDICTION.

This is an appeal from a judgment rendered against the appellant Edgerton by the District Court of the United States for the Southern District of California, Central Division, upon a verdict finding appellant guilty of violating Section 338, Title 18 U. S. C. (commonly known as the Mail Fraud Statute) as charged in Counts 1 and 2, 4-9, 11-14 of Indictment filed in said Court on June 18, 1941. These counts of the Indictment charged a substantive offense. [Indictment R. 3-39; Verdict R. 52; Judgments R. 58.] The appellant was sentenced to a term of imprisonment of 2½ years on each of Counts 1, 4, 6, 8, 11 and 13, said sentences to run concurrently with each other, and placed on probation for a period five years on each of Counts 2, 5, 7, 9, 12 and 14,

the probation periods to run concurrently with each other and commencing at the expiration of the service of sentence on Count 1 [R. 58-60].

Thereafter, the appellant duly filed his Notice of Appeal from the said judgment against said appellant within the time prescribed by law [R. 61].

Thereafter, appellant duly filed an Assignment of Errors within the time prescribed by law [R. 1050-1189].

Thereafter, a Bill of Exceptions containing all of the evidence in this case, the instructions of the trial court and all proceedings subsequent to trial, was prepared and filed [R. 74-1048].

Thereafter the record in this case, including said Bill of Exceptions and certain Exhibits separately and directly certified, was filed with the Clerk of this Honorable Court, together with a statement of points to be relied upon on appeal [R. 1191], which points are identical with the Assignment of Errors [R. 1050-1189].

STATEMENT OF THE CASE.

Issues Presented by the Indictment.

The counts of the Indictment under which appellant Edgerton and one of the other defendants on trial was convicted, and pursuant to which judgment was entered, charged this appellant and the defendants Russell W. Starr, Edward C. Thomas, Joseph L. Smale, Alfred R. Ireland, Clifford W. Twombly, and Charles L. Cronk with having "devised and intended to devise a scheme and artifice to defraud and for obtaining money and property * * * from investors in the Railway Mutual Building and Loan Association, * * * who had theretofore con-

verted and transferred their investments in the said Railway Mutual * * * into securities of the First Security Deposit Corporation * * * by means of false and fraudulent pretenses, representations and promises, which said scheme and artifices was * * * as follows," [R. 4-5]: The scheme and artifice then set forth is that, following the organization of the First Security Deposit Corporation in November of 1931,

(a) the defendants "for the pretended and alleged purpose of liquidating the assets of the said Railway Mutual * * * induced the persons intended to be defrauded to exchange their securities in the said Railway Mutual * * * for securities issued by the said First Security * * *;" that as a result of this exchange the First Security became the beneficiary of certain assets of the Railway Mutual, said assets being of an equivalent book value to the securities issued by the First Security, which assets were placed in trust with the Metropolitan Trust Company and were releaseable only upon surrender of bonds and securities of the First Security for cancellation [R. 6-7], and "that the defendants at all times represented and pretended that First Security * * * was organized for the purpose of * * * and actively engaged in the liquidation of the said assets received by it from the Railway Mutual * * *; whereas, * * * no such liquidation was in fact being carried into effect * * *" [R. 8];

(b) that the defendants "did depress and cause to be depressed the market price of the securities of the First Security so that defendants might and did acquire the same * * * at prices greatly reduced * * *" [R. 8];

(c) that the defendants "under the pretense of loans, and by divers * * * ways * * * unknown, did convert and divert to their own use * * * money and property of the said First Security * * *" [R. 8]; and,

(d) that the defendants "would and did represent * * * the First Security * * * would and did loan or advance money only upon securities or properties theretofore approved as legal investments by the superintendent of banks or the commissioner of corporations of the State of California, whereas, in truth and in fact * * * large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to the Investment Finance Co., for the use and benefit of the defendants without any security whatsoever." [R. 9.]*

The only false and fraudulent pretenses, representations and promises alleged to have been made to that class of persons intended to be defrauded were two:

1. The First Security was organized for and engaged in the liquidation of the Railway Mutual assets, and

2. The First Security would loan money only upon security or properties theretofore approved as legal investments.

These are the only false representations alleged. It will be noted that they are repugnant, *i. e.,* engaging in the business of loaning money is inconsistent with actively liquidating assets. The allegation with reference to liqui-

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*The above underscored allegation of the Indictment the Court ordered stricken from the Indictment [R. 991-992, 999-1000].

dation is of the assets that were "placed * * * with the Metropolitan Trust" [R. 6, 8].

The essence of the scheme to defraud, to avoid repugnancy, is one of inducing Railway Mutual security holders to exchange their holdings for securities of the First Security upon a plan that the assets of the Railway Mutual placed in trust would be liquidated, in proportion to the securities of the First Security from time to time surrendered to the Metropolitan for cancellation, and that the First Security would with its cash resources only loan money upon "approved * * * legal investments," whereas the defendants loaned and diverted the funds flowing to the First Security to themselves or otherwise for their personal use and benefit without any security. There would only be consistency in these two allegations under this view, otherwise on their face they are repugnant.

The Issues Submitted to the Jury.

The Court in its instructions segregated these two alleged false representations, treating them separately, and instructed the jury that finding of either representation as having been made and as false would be sufficient to support the indictment [R. 999]. The alleged false representation with respect to loaning money "*only* upon security or properties theretofore approved as legal investments," is quite different from the one submitted to the jury for determination as to its truth or falsity. By striking the words "theretofore approved as legal investments, etc." the Court created an entirely new and different representation—he changed the charge. The jury was authorized to find the character of the false

representation, which induced the persons to be defrauded to part with their property, as something less than that which the indictment actually charged.

There was no proof that the First Security received any assets from the Railway Mutual, only that it received assets out of the Metropolitan Trust, as, if and when it deposited securities of its own issue in an amount in 10% excess, as per provisions of the trust, of the book value of the assets released.

The Court did not treat the representation concerning liquidation as one to be found by the jury as false with respect to inducing the persons holding Railway Mutual securities to exchange them for securities of the First Security, but as a continuing false representation with respect to what the First Security was doing with the assets it received from the Metropolitan Trust upon the surrender of its own securities acquired from its security holders, brokers and other sources. The Court told the jury that if it found that the defendants represented the First Security was engaging in the liquidation of the assets of the Railway Mutual received by it when as a matter of fact "no such liquidation has been carried into effect," that this alone was sufficient to support the allegation of the making of false representations [R. 1026, 999[.

The jury, as we have seen, was authorized to find a verdict against the appellant upon the finding of either false representation pleaded [R. 999]. We cannot speculate as to whether the jury found both allegations of misrepresentation had been proved, or one as against the other. For ought we know the jury reached a conclusion that the allegation of misrepresentation as *amended*

by the trial court was the sole one finding support in the evidence.

Williams v. North Carolina, 87 L. Ed. 189, 191.

The allegation that the defendants under the pretense of loans converted and diverted to their own use money and property of the First Security was wholly unsupported by any evidence.

The allegation that the defendants did depress and cause to be depressed the market price of the said securities of the First Security so that they could acquire them from the persons intended to be defrauded at "prices greatly reduced," likewise finds no support in the evidence. There was no evidence as to "market price" or market value of the securities of the First Security. Without proof of some market price there was no warrant for finding that it was depressed. Before the market price can be said to have been depressed or that one's acts and conduct caused it to be depressed, there must first be evidence of a market price. Again, mere proof of a market price and that it was depressed would be insufficient to establish an offense under the Statute; there must be proof of a false pretense or representation, independent and apart from actually causing a market price to be depressed, so that one might acquire properties and securities at reduced prices. This element (representation) cannot be supported alone by actions causing a depressing of market prices, as this may be due wholly to bad business management. The Court as to this allegation instructed the jury that if they found "that a *situation* was caused whereby the persons * * * intended to be defrauded were not able to get as high a price for their securities

in the sale of them as they would have had it not been for the activities of the defendants * * * then you are at liberty to find that the defendants depressed and caused to be depressed the market price of the securities of the First Security * * * as alleged in the indictment." [R. 1033.]

The Facts in Evidence.

The Plan of Reorganization of Railway Mutual.

The Railway Mutual Building and Loan Association was organized Sept. 24, 1927 [R. 91]; in October, 1931, its Executive Committee was designated to investigate and recommend an advisable method of reorganization, resulting in a Plan, Agreement and Declaration of Trust for reorganization being entered into on November 27, 1931 [R. 200]. Under this "Plan, Agreement and Declaration of Trust", the defendants R. W. Starr, E. C. Thomas and L. S. Edwards, all officers of the Railway Mutual, were named "as trustees" [R. 193]. They also were named as the reorganization committee in said agreement and also designated as managers thereof [R. 299-200]. There were three parties to this Plan and Agreement, the first being the trustees and managers, the second the depositors of securities, and the third the First Security Mortgage Company. (This name was changed to First Security Deposit Co.) [R. 299-300]. However, the depositors as such did not sign, the document being executed by the said R. W. Starr, E. C. Thomas and L. S. Edwards as "Co-managers" and by the First Security Mortgage Corporation, by R. W. Starr, President and L. S. Edwards, Secretary [R. 314]. The "Plan, Agreement and Declaration of Trust for the reorganization of the Railway Mutual Building and Loan

Association", first, generally recites the reasons for the reorganization, *i. e.*, adverse conditions created by the activities of promotional groups exploiting building and loan associations, the resulting effect of the new Building and Loan Act of California, effective August 14, 1931, upon building and loan associations and the changing economic conditions, making it advisable to adopt a new legal structure and convert a portion of the assets of the Railway Mutual into a savings and loan corporation [R. 291-294]; it then recites that a new corporation has been organized in California, known as First Security Mortgage Corporation, which would engage in the business of "loaning and advancing money and to take as security therefor securities or properties which shall be approved as appropriate legal investments by the Superintendent of Banks and/or the Commissioner of Corporations . . . and to operate a general savings and mortgage business" [R. 295].

This Plan and Agreement contemplated that the said trustees were to receive for deposit the securities of the Railway Mutual, and that the newly formed corporation would issue its securities to be transferred to the individuals depositing their Railway Mutual securities; that securities of the First Security would be issued in equal amounts for securities of the Railway Mutual so deposited [R. 178-192] and that the security holders of the Railway Mutual would participate in the new corporation to the same extent and with the same privileges and burdens as were granted to or cast upon them as said security holders under the Railway Mutual [R. 179-182]; that the securities of the Railway Mutual would be deposited with the trustees under the Trust agreement which would con-

stitute the corpus of the trust estate until physical assets, such as notes, mortgages, deeds of trust, etc., owned by the Railway Mutual would be deposited with the trustee in lieu of the securities of the Railway Mutual [R. 182]; that this exchange of physical assets would be made at their book value [R. 183]; that the Railway Mutual Investment Certificates would receive Collateral Trust Bonds or Certificates of the prior classification from the First Security of an aggregate face value equal to the book value of such an investment certificate at the time of exchange.

Broad powers were granted under the Plan and Agreement to the trustees and managers. They were given the power to declare the Plan operative as to all or any class or classes of securities and obligations, construe the Plan and the "construction thereof or action thereunder as determined by the Trustees and Managers, shall be final and conclusive in effect", and under certain conditions could modify and change the Plan [R. 296-298]. The Reorganization Agreement was made a "part of the Plan", "which shall be construed together as parts of one and the same instrument"; the managers were to endeavor to carry the Plan into practical operation either in its entirety or in part to such an extent and in such manner and with such additions, exceptions and modifications as the managers shall deem to be for the best interest of the depositors or of the properties finally embraced in the Plan [R. 299-302].

The managers could organize one or more new companies whenever and wherever in their discretion they may determine, or may adopt, or may use any existing or future companies, and may cause to be made such

consolidations, mergers, leases, sales or other arrangements, make such conveyances or transfers of any properties or securities acquired, and take such other steps as they may deem proper for the purpose of creating the new securities provided for in the plan and carrying out all or any of the provisions thereof [R. 304]. They could cause the ownership of all or any property of the corporation to be either a direct ownership or ownership through bonds or shares of stock, or both, of any other company; and cause any purchase money mortgage or any mortgage or lien in renewal thereof, but not in excess of the amount of those then existing on property securing securities of or assumed by the corporation or any of its allied, constituent, controlled or subsidiary companies, to be either a direct lien upon any particular property or a lien upon bonds or shares of stock of any company owning such property; consent to and approve, upon such terms and conditions as they shall prescribe any modification or amendment of any bond or obligation of the corporation or any of its subsidiary or affiliated companies and/or the mortgage or indenture on which they were issued.

That in case any separate plan shall in the opinion of the managers become expedient to effect the reorganization of any subordinate or other company or as to any property of the Association (Railway Mutual) the managers may promote and participate in any such reorganization and may deposit thereunder any securities thereby affected; that the managers may effect such mergers or consolidations of allied, constituent, controlled, or subsidiary companies, or other companies constituting a part of the properties and assets of the Association (Railway Mutual) or its allied constituent, controlled or sub-

sidiary companies as they may deem advisable and organize or utilize one or more subsidiary or affiliated companies for the purpose of acquiring or holding any properties or securities subject to the reorganization or acquired under this plan [R. 304-306]. It was provided that the managers may form or procure the formation of any syndicate or syndicates which they may deem advantageous for carrying out the purposes of the plan and agreement, and may act as managers of such syndicate or syndicates and may act as directors and officers of the corporation or any other companies organized to carry out the purposes of the plan and may act so in association with others. The managers were not to be disqualified from holding any office in such other companies and receiving compensation therefor [R. 308].

The managers could in their discretion form additional groups to underwrite the participation in the plan of any class or classes of securities, obligations or claims, or to provide the cash or other funds required to make any purchase of existing securities, obligations or claims which the managers deemed advisable, or to provide the cash or other funds required which would be payable to any holders of securities, obligations or claims upon any sale or sales of the properties involved, or for any other purpose deemed advisable [R. 309].

The enumeration of the specific powers thereby conferred were not to be construed to limit or to restrict the general powers conferred; that in all respects any and all powers which the managers deemed expedient in or towards carrying out or promoting the purposes of the plan and agreement in any respect even though such power be apparently of a character not presently con-

templated was conferred on the managers [R. 309-310]. The "Managers" were empowered to construe the plan and agreement, their construction thereof or action thereunder being conclusive; they were authorized to supply any defect or omission and reconcile any inconsistency in such manner and to such extent as they deemed expedient to carry out the same effectively, and were made the sole and final judges of such expediency [R. 311].

Two years was provided within which to declare the plan operative unless the time was extended by the managers and by the Board of Directors of the Corporation (First Security) [R. 313].

This Plan, Agreement, and Declaration of Trust is not signed by the depositors, but was executed by the managers and the First Security Mortgage Corporation [R. 314]. It was stipulated this document was executed and became effective without the signatures of the depositors; that a "consent" was signed by depositors and this constituted the depositors execution of the document [R. 314].

There was no evidence of any depositor at any time having examined this Plan, Agreement and Declaration of Trust; whatever information they had concerning it came from a brochure circulated among the security holders of the Railway Mutual [R. 324].

The Activities of the Reorganization Committee and Plan Managers.

The attorneys for the reorganization committee of the Railway Mutual were Haight, Mathes & Sheppard, and later the firm of Haight and Trippett; they were also attorneys for the First Security Deposit Corporation. They acted as such attorneys until April 1933 [R. 324, 192].

The officers and directors of the Railway Mutual were also officers and directors of the newly organized corporation, the First Security [R. 174, 212]. Of these the defendant R. W. Starr, a doctor for the Southern Pacific Railway was President and director; the defendant J. L. Smale, Paymaster of the Pacific Electric Railway Company, Vice-President and Director; the defendant E. C. Thomas, Assistant to the President of the Pacific Electric Railway Company and head of its publicity Department, was Vice-President and Director; the defendant A. R. Ireland, who had been connected with the Pacific Electric Railway for 20 years, was a director. The other five directors who were not named as defendants were S. L. Edwards, Wm. Leffert, J. S. Borsch, and W. S. Brayton [R. 174-212]; they were either connected with the Southern Pacific Railway Company or local businessmen, with the exception of Brayton who was formerly a judge.

These officers and directors of the Railway Mutual and First Security were in the main large security and stockholders in both corporations and remained as officers and directors of the First Security with the exception of some of the non-defendants throughout the period of time covered by the indictment [R. 272].

The application of the First Security for a permit to issue securities, Sept. 10, 1932 [R. 168], recites its purpose to be to lend its funds "at a rate of interest exceeding that paid for money received by it," and that said loans "are to be made *largely* on an amortizing basis, and *are to be largely secured* by deeds of trust;" also, that it would engage in various collateral business such as acting as insurance brokers, etc. [R. 171].

A brochure was sent out by the reorganization committee to the security holders of the railway Mutual on December 5, 1931. This is the first approach made to reach the security holders of the Railway Mutual with the proposal of a plan of reorganization. It shows Haight, Mathes & Sheppard as legal counsel for the First Security and of the Plan and Agreement of reorganization. It asserts the opinion of the Committee that the best interests of the investors would be preserved by converting the "Association's structure into a mortgage company," and sets forth the basis upon which the Railway Mutual securities will be exchanged for those of the First Security. Aside from the basis upon which securities will be exchanged no detail of the plan and agreement is set forth. The document recites that the reorganization committee "reserves all its rights and powers under the Plan and Agreement, including the right to amend the same in respect of the treatment of securities deposited thereunder or otherwise, as provided in said Agreement," and then states "original and duplicate copies of the Plan and Agreement are on file for inspection," at the Railway Mutual and Headquarters of Reorganization Committee, "and reference is here made to same for a statement of the full terms and conditions thereof and the powers and authority of the undersigned Reorganization Committee" [R. 324, 330].

Neither in this initial document to the security holders of the Railway Mutual or any communication thereafter, either written or oral, was any reference made that the Plan and Agreement of reorganization stated the purpose of the First Security to be one of "loaning or advancing money and to take as security therefor securities or prop-

erties which shall be approved as appropriate legal investments by the Superintendent of Banks," etc. Subsequent communications do make reference to the conditions existing in the building and loan "field," the handicaps under which those engaged in that field were laboring under, the effect of moratorium legislation and amendatory legislation to the Building and Loan Act, and the advisability of changing the form of the corporate structure of a building and loan to a more flexible one of a company engaging in the mortgage business. None of these documents and letters make any representation that the Plan and Agreement contemplated, or that it was the purpose of said Plan and Agreement and/or the First Security, to liquidate the assets of the Railway Mutual [R. 324, 338].

The Reorganization Committee announced that as of April 1932, 70% of outstanding securities of the Railway Mutual had been deposited with it and declared the plan operative [R. 336]. On October 5, 1932, the Reorganization Committee announced that a permit had been issued by the Corporation Commissioner to the First Security to issue its securities in exchange for the securities of the Railway Mutual in accordance with the provisions of the Plan and Agreement for reorganization and that delivery of securities of the First Security would commence on October 15. 1932 [R. 338].

As we have seen, the Plan was to convert a portion of the assets of the Railway Mutual "into a mortgage corporation enjoying all of the advantages of the mortgage corporations, generally," and avoid "being handicapped by the conditions existing in the building and loan field" [R. 180, 332, 333]. No charge was contained in the Indict-

ment that this was a false representation and the plaintiffs made no such contention.

There is no evidence in the record that any representative of the Reorganization Committee or the First Security called upon any of the Railway Mutual investors and made any representations whatsoever concerning the Plan and Agreement and Declaration of Trust for the reorganization of the Railway Mutual; nor is there any evidence in the record that any representative of either the Railway Mutual or the First Security solicited anyone in person to exchange their Railway securities for those of the First Security.

The Operation of the Plan of Reorganization.

Following the Committee declaring the Plan operative and the issuance of the securities of the First Security for those of the Railway Mutual on deposit in the fall of 1932 [R. 337, 338] and prior to the segregation and division of the physical assets of the Railway Mutual and deposit thereof with the Metropolitan Trust in proportion to the amount of Railway securities deposited under the Plan (and in lieu of such Railway securities), the source of income of the First Security was its pro rata share of the income of the Railway Mutual.

The Railway Mutual income was reduced as a result of moratorium legislation—this legislation reduced the interest rate charged borrowers and established a moratorium "under the terms under which payments on principal being received from borrowers" was reduced. Plaintiff's witness Perkins testified there was a 12% reduction in income on mortgage loans as a result of legislative action [R. 240]. This resulted in exten-

sions of the maturity dates of the First Security collateral Trust Bonds and notes for various periods pursuant to their terms [R. 339, 369, 226-231, 236].

Communications of the First Security to Its Security Holders.

In form letters announcing these extensions or those making payments of interest and principal to the security holders this condition was called to their attention, as well as the fact that certain enabling legislation had been enacted permitting segregation of assets of a building and loan association upon the consent of 75% in value of securities of an association to a Plan of reorganization; also attention was called to the general economic conditions and the effect thereof upon real estate values, the extensiveness of real estate mortgage foreclosures and the need of a general improvement in economic conditions and recovery of real estate values in order to solve the company's problems [R. 341-369].

There was no mention that the First Security was organized for the purpose of liquidating the physical assets of the Railway Mutual. On the contrary, reference is repeatedly made to the advantages which would accrue to the First Security following the segregation of assets, *i. e.*, restoration of interest rates to be written into existing loan contracts, liquidation of repossessed properties through exchanges for bonds with a corresponding decrease in outstanding obligations of the First Security, placement of the company's outstanding obligations on a sound financial basis which would admit of normal liquidation without sacrifice thus enabling the company to take advantage of any recovery in real estate values, and that the *"time is closely approaching when the company can*

resume active operation as a going institution." [R. 347, 348].

The foregoing extensions were made and communications sent during the year 1933 and early in 1934. On April 19, 1933 the minutes of the First Security disclosed action by the Board extending the interest on short term notes and one-third of the principal due for a period of 120 days because of the financial condition "of the corporation at the present time"; that "advice from Haight & Trippet, attorneys for the corporation relative to present and future procedure was read, its provisions concurred in by the Board of Directors, and provisions therein not already complied with were ordered placed in effect. In line with recommendations of the attorneys, the following letter was ordered sent to all holders of short term notes due and payable May 1" [R. 237-239].

Appellant Edgerton's Identification With First Security.

Plaintiff's witness Drozda testified that he re-identified himself with the First Security on March, 1933; that he became manager of the company in 1934, succeeding Mr. Barry [R. 405]. The minutes of June 4, 1934, show that Drozda was appointed General Manager; that the defendant Twombly was at the meeting of the Board of Directors on Oct. 29, and was appointed General Manager to succeed Drozda, effective Nov. 1, 1934 [R. 408-409]. Mr. Drozda further testified that appellant Edgerton became counsel for the corporation prior to the time of his becoming manager [R. 406]. That he would say it was in the forepart of his employment; that he can't place the time definitely [R. 404]. During the period of time that

he acted as Manager Mr. Edgerton was legal counsel for the company and all legal problems would be referred to him [R. 406]; that Mr. Edgerton performed legal services in connection with the segregation and division of the assets between the Railway Mutual and the First Security; that from time to time questions arose in connection with the trust. Mr. Edgerton would handle these legal problems with the Metropolitan Trust Company. Also, there were many legal problems in connection with the sale of properties and exchanges, foreclosures, taxes, delinquencies, etc. [R. 407] which were handled by Mr. Edgerton. That whenever he needed legal advice in connection with the affairs of the company he would go to Mr. Edgerton for an opinion.

The first identification of the Appellant Edgerton with either the First Security or Railway Mutual in point of time occurs on September 25, 1933; the minutes of the Railway Mutual of that date recite that in addition to the directors, Mr. Edgerton was present as legal counsel. A resolution was adopted directing the Reorganization Committee named in the Plan and Agreement to petition the Building and Loan Commissioner for a separation and segregation of the assets in accordance with the Plan and Agreement [R. 198-200]. A stipulation, however, appears in the record that Mr. Edgerton acted as attorney from March 1933 to December 31, 1940 for the First Security, but this is contradicted by the evidence which shows that Haight & Trippet were acting as its attorneys on or about April 19, 1933 [R. 272, 236, 239].

Thus it will be noted that Mr. Edgerton did not become identified in any manner with these two companies until long after the formulation of the Plan and Agreement

of reorganization. Representations made with respect to the nature and character of this Plan of Reorganization, the securities of the depositors in the Railway Mutual exchanged for those of the First Security; these occurred long before Mr. Edgerton became attorney for the company. The company was already beset by the problems of reduced income, legally reduced interest rates, moratoriums on principal amounts due, and in the throes of the then current severe general economic depression and deflation, when the appellant Edgerton became identified with it.

The defendant Twombly became General Manager of the First Security on November 1, 1934 and functioned in that capacity until Sept. 21, 1938, being succeeded by Mr. Edgerton on October 19, 1938, who served until Dec. 31, 1940 [R. 409, 274, 272]. Mr. Edgerton was not a director of the company, had no common stock interest in it at any time and only became a minor preferred stockholder in 1939. Jointly with his wife, he had 579 shares out of a total of 12,604 [R. 281, 285, 286].

The defendant R. W. Starr served as President from December 4, 1931 to February 15, 1939, as a director from December 4, 1931 to December 31, 1940, as a member of the Executive Committee from November 11, 1932 to December 31, 1940, as a member of the Securities Committee from February 21, 1934 to December 31, 1940. The defendant Smale served as Executive Vice-President from December 4, 1931 to September 20, 1933, as director from December 4, 1931 to September 20, 1933, and from February 15, 1939 to December 31, 1940, as a member of the Executive Committee from November 11, 1932 to December 31, 1940, and as President from February

15, 1939 to December 31, 1940, and at various times on committees of the corporation. The defendant A. R. Ireland served as a director from December 4, 1931 to March 15, 1933, and from February 21, 1934 to December 31, 1940, and as a member of the Finance Committee from February 21, 1934 to February 4, 1940. The defendant E. C. Thomas served as director from December 4, 1931 to December 31, 1940, as Vice-President from December 4, 1931 to February 21, 1934, as Executive Vice-President from September 20, 1933 to December 31, 1940, and as a member of the Executive Committee, the Security Committee, and other committees at various stated times. The defendant Twombly served as director from November 21, 1934, to December 31, 1938, as Secretary from November 21, 1934 to December 21, 1938; was General Manager from November 1, 1934 to September 21, 1938, and a member of the Executive Committee and Securities Committee from February 1936 to December of 1938 [R. 272].

Arrangements for Purchase of Bonds of First Security and Liquidation of Its Real Estate.

The segregation and division of assets of the Railway Mutual was ordered by the Building and Loan Commission on December 29, 1933 [R. 210, 204], in accordance with "that certain Plan and Agreement and Declaration of Trust dated November 27, 1931." These physical assets were deposited pursuant to the trust agreement with the Metropolitan Trust Co. [R. 106, 406]. The physical assets transferred were at their book value [R. 204, 210, 106].

The First Security set up a department functioning under the fictitious name of "Reality Deposit Company"

pursuant to a certificate to do business under that name dated October 24, 1933 [R. 315-317].

In a letter dated January 2, 1934, from the law office of Paul Nourse (Mr. Edgerton's employer since 1930, when he got out of law school) [R. 159], and signed by Mr. Edgerton, reference is made to "the Realty Deposit Company"; the letter recites "from our conversation the other day, it is my understanding that *you contemplate* authorizing the Realty Deposit Company which is a subsidiary department of the First Security . . . to purchase bonds of the First Security at their market value." This concept of the Realty Deposit Company was that of the management itself and not of Mr. Edgerton. The company through this subsidiary department purchased its own bonds at the market value similarly as other building and loan associations were doing [R. 317-318]. On June 30, 1934, Mr. Edgerton advised the First Security to dissolve the Realty Deposit Co. at its next board meeting and transact future business in its own name [R. 319], which was accordingly done.

The use of the Realty Deposit Company as a separate department of the First Security was first initiated for the purpose of enabling the company to build up a subsidiary real estate department with a sales staff for the sale of its own real estate, as well as that of other Building and Loan Associations and Mortgage Companies which did not have the facilities for handling and disposing of their own real estate. As a matter of policy it was deemed expedient to operate the real estate department under the fictitious name and style of "Realty Deposit Company" [R. 322-323].

The Corporation Commissioner was advised, June 30, 1940, regarding the policy of the First Security, *i. e.*, that the company, in order to facilitate the sale of real estate adopted a policy of accepting its outstanding bonds in return for real estate carried on the books of the corporation. The method used in this respect permitted a party buying real estate to turn in bonds owned by him as the full consideration for the real estate. The company when it sold real estate for cash, such transactions usually showed a loss; but when it sold for cash it would then use the cash funds in buying its outstanding bonds on the open market from a licensed stock broker offsetting the loss sustained in these cash transactions by the profit made by the purchase of bonds at the prevailing market price. These bonds so purchased on the open market or received in any real estate transactions were immediately sent to the Metropolitan Trust Company for cancellation reducing thereby the outstanding obligations of the company [R. 320-321].

The First Security acquired from November 1932 to December 21, 1939, $1,267,649.15 of its collateral trust bonds from various sources including the Investment Finance Company [R. 532, 528, 540]. As of December 31, 1939, there were outstanding only $17,891.31 of collateral trust bonds plus accrued interest of $4,032.17; this amount was "deposited in the Metropolitan Trust by the First Security to cover all outstanding bonds." The total securities issued by the First Security were entirely liquidated as of that date [R. 532].

A large amount of the bonds were acquired by the First Security from security holders applying the face amount of their bonds on their loans [R. 529]. Others were ac-

quired by payment of the face amount as they matured [R. 528]. Others were acquired in exchange for real estate.

During the period of August 30, 1935 to 1939 [R. 536-539, 540], the First Security acquired from the Investment Finance $240,929.99 of said collateral trust bonds. The aggregate total face amount of bonds of the First Security acquired by the Investment Finance during its existence was broken down as follows: 1935, $6,376.75; 1936, $30,184.78; 1937, $100,238.29; 1938, $92,057.17; 1939, $12,073.00 [R. 537-539]. The average rate paid in 1937 was 70.08%; in 1937, an average of 79%; and in 1939, a rate slightly above par [R. 537-539]. The defendant Cronk was active from July 1937 until the end of 1938 on behalf of Investment Finance in contacting and communicating with holders of securities of the First Security on behalf of the Investment Finance [R. 276, 543, 506-516]. All the indictment letters were letters of the defendant Cronk [R. 3-28, 32-39]. The alleged victim witnesses who sold their securities testified they had received communications from Mr. Cronk; they sold their securities to the Investment Finance at approximately the above rates [R. 455, 669, 672, 681, 695-696, 702, 706, 709, 723, 728, 740, 748, 800]. As of December 31, 1939, all of First Security outstanding securities were retired and the trust fully liquidated [R. 532].

Operations of Investment Finance Company.

The organization of the Investment Finance Company was authorized by the First Security at a meeting of its board of directors on August 31, 1935. The board concluded it was for the good of the corporation to use its

liquid assets in some active and profitable business, and to take advantage of the opportunities presented by the Personal Property Loan Brokers' Act of California. The board directed the organization of a separate corporate entity for the general purpose of conducting "a general finance business but more particularly, a business of loaning money upon personal property as security, said corporation to be capitalized at $200,000.00 with one class of common stock . . . at a par value of $1.00 per share . . . that the secretary be . . . authorized to purchase not to exceed $100,000.00 worth of common stock . . . at such time and times as he may deem necessary for the best interests of this corporation and the new one to be formed" [R. 372]. As we have seen, the appellant Edgerton was not on the board of directors of the First Security, and he was not present at the meeting authorizing the organization of the Investment Finance [R. 272, 371].

The First Security, at its board of directors' meeting held on November 20, 1935, authorized the secretary to loan to the Investment Finance Company $50,000.00, and directed that the secretary "refer the matter as regards the procedure involved in the handling of the said loan or loans to H. D. Campbell for his opinion" [R. 373-374], a certified public accountant [R. 620]. Mr. Edgerton was not present at this meeting, nor was the matter of handling of loans of the First Security to the Investment Finance referred to him as attorney for the company.

The Investment Finance was incorporated on August 30, 1935, and dissolved August 31, 1940 [R. 275]. The defendant Starr (president of the First Security) was

president of the Investment Finance, a director, and member of the Bond Committee. The defendants, Smale, Ireland, and Thomas, directors and officers of the First Security, were directors of the Investment Finance. The defendant Twombly was director, secretary-treasurer, Investment Finance from its incorporation to December 21, 1938, and General Manager until Sept. 21, 1938. The appellant Edgerton was a director and vice-president from September 5, 1935 to March 1, 1938, and General Manager from October 19, 1938, to August 31, 1940, and attorney for the company [R. 275-276]. The offices of the First Security and Investment Finance were jointly conducted at the same address [R. 795].

Originally, the Investment Finance Company issued a thousand shares to the First Security, and ten qualifying shares to each of its directors; as of August 18, 1937, and thereafter until dissolution, there was outstanding 31,-398 shares, and as of that date there was standing in the name of the defendant R. W. Starr 8,422 shares, the defendant A. R. Ireland 6,900 shares, the defendant C. W. Twombly 260 shares, the defendant E. C. Thomas 1,410 shares, the defendant Smale 2,690, and the appellant Edgerton 2,109 [R. 560-561, 287].

Upon the dissolution of the Investment Finance, August 31, 1940, the balance of its indebtedness to the First Security, $250,465.80,. was retired as of that date by the assets of the Investment Finance being transferred to the First Security [R. 640]. The assets so transferred were $266,723.76 [R. 641].

On May 20, 1936, the board of directors of the First Security authorized its secretary-treasurer, the defendant Twombly, and its president, the defendant Starr, to vote

the stock owned by it in the Investment Finance Company [R. 580, 272, 275].

After the organization of the Investment Finance, the First Security loaned to it moneys and assets at book value. As of January 1937 the balance of its borrowings of cash and assets after repayments amounted to $211,-110.19. As of August 1937 the balance amounted to $246,884.07 [R. 563-566]; by December 31, 1937, the balance was $244,705.51 [R. 566]; by May of 1939, the balance due was $208,829.96 [R. 571]. The total of such loans of cash and other assets throughout the period amounted to $450,946.39, leaving a balance due after repayments of $250,465.80 as of March 1940 [R. 573]. In addition, interest was paid by cash or other credits in the amount of $29,793.07 [R. 574] at rates of 3% and 6% respectively [R. 571]. The assets borrowed were trust deeds, real estate, etc. These were charged to the account of the Investment Finance at the book value at which the First Security carried them on its books [R. 575, 581-582].

The repayments by the Investment Finance to the First Security were made in the main with the collateral trust bonds of the First Security for which credit was given in the face amount; also, some repayments were in cash [R. 590-592]. There was no requirement of the Investment Finance to return any of the assets borrowed; the valuation as carried on the books of the First Security was transferred and added to the indebtedness of the Investment Finance to the First Security [R. 633-634].

The approximate high point of the First Security loans to the Investment Finance Company was at a time when

the First Security was the sole owner of the outstanding stock of the Investment Finance Company [*supra,* pp. 27, 28].

Over objection, plaintiff was permitted to show the business activities, loans, and investments of the Investment Finance Company. These were admitted by the Court as being material on the allegations of the indictment "which say the money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department and . . . I am permitting this evidence to go as being material to the plaintiff's case in connection with that allegation" [R. 861], and "it is simply under the one matter alleged in the indictment, namely, that this corporation invested in other than securities which were indicted in its representation" [R. 857]. Ultimately, the Court amended the indictment by striking this allegation [R. 991, 1000], but denied the motions to strike this evidence.

There is nothing charged in the indictment that any representations were ever made to any security holder of the First Security or any other person respecting the organization of the Investment Finance Company or its purpose as reflected by the above minutes of August 21, 1935 [*supra,* p. 25], or that a greater interest rate could be received by engaging in the business of making personal property loans under the Property Loan Brokers' Act, or otherwise, or is there any evidence that any representations were made to this effect.

The minutes of the Investment Finance, October 13, 1936, relate to a proposal to acquire jointly with Battelle-Dwyer a controlling interest in the American National Bank of Santa Monica. On October 21, 1936, the minutes

of the Investment Finance reflect a motion adopted to purchase 100 shares American National Bank of Santa Monica for $15,000.00, and a loan to Battelle-Dwyer and Company of $25,000.00, secured by 167 shares of American National Bank stock. On November 9, 1936, the board of directors ratified a voting trust dated November 4, 1936, signed by the defendant Starr as president, and the defendant Twombly as secretary [R. 375, 376-377].

The plaintiff was permitted to show over objection that the assets transferred by the Investment Finance as of August 31, 1940, upon its dissolution, to the First Security, consisted of "notes receivable, $44,010.02; obligations of the Pacific Brick Company, $38,415.33; obligations of the Bond-17 Dog Food Company, $111,018.81; obligations of the American Building and Investment Company, $19,339.74; stock of the American National Bank of Santa Monica, $23,646.00; stock of the First Security Deposit Corporation, $29,984.80; second trust deeds, $28.67; furniture and fixtures, $12.67; prepaid expense, $17.47; suspense, which is the reserve for contingencies, $250.25; total, $266,723.76" [R. 641].

The plaintiff conceded that defendants went on the board of the companies to which the Investment Finance had loaned money or in which it had made investments as a matter of policy of the Investment Finance Company, with the exception of the Pierce Petroleum and the Pacific Brick Company [R. 642].

As to the Pacific Brick Company, it was conceded, the defendants who had an interest therein, had only a minority one, $3,000.00 out of $50,000.00 [R. 643]. The stock interest shown was in Starr and Thomas [R. 860]. The appellant Edgerton had none.

The Pacific Brick Company was organized on May 21, 1937 [R. 824]. The initial application for permit requested the issuance of 50,000 shares with par value of $1.00 [R. 828], and the amendment requested the company be permitted to sell stock to Investment Finance Company, on the same terms it was authorized to sell shares to the persons named in the original application [R. 830-831]. As of August 20, 1937, there were outstanding shares of the Pacific Brick in the amount of 10,000, 500 of which were in the name of the defendant E. C. Thomas, and 1,410 in the name of the defendant R. W. Starr [R. 860]. There is reflected no further stock thereafter being acquired by any defendant, but that the Investment Finance Company, as of July 28, 1938 and August 5, 1938, acquired an aggregate of 21,106 shares for a consideration of $18,313.00 [R. 866].

As to the Pierce Petroleum, the stock interest appears about fourteen months subsequent to the creation of the obligations between the Pierce and the Investment Finance. Investment Finance Journal as of December 17, 1935, shows notes receivable from the Pierce Petroleum Corporation [R. 817]; on February 19, 1937, according to the minutes of the Pierce Petroleum Corporation reflects "Edgerton 200 shares, Twombly 100 shares" [R. 819].

The Investment Finance Company, on August 12, 1938, subscribed for and bought 1,700 shares of the 25,000 shares originally issued by the American Building and Investment Company, paying therefor a consideration of $17,000.00; according to the Application for Permit to Issue Shares, the principal business of the American Building Investment Company was investment in real

estate loans, business investments of a general nature, and financing of a general insurance agency [R. 860]. No defendant had any financial or stock interest in this company [R. 857].

The corporate purpose of Bond-17 Dog Food Company was to manufacture and sell pet food. The Investment Finance books reflect acquisition of stock of that company February 1, 1938, and on various dates thereafter to August 29th; that it acquired in that period 89,420 for a total price of $45,826.17; and its books reflect loans made and repayments thereof from May 10, 1938 to August 8, 1940, and as of August 8th the total notes receivable amounted to "$65,150.00, repayments not shown" [R. 863-866].

It was stipulated that none of the defendants had any stock interest at any time in either the Bond-17 Dog Food Company nor the American Building and Investment Company; also, that the appellant Edgerton had no stock interest in the Pacific Brick Company. The defendants derived no money or profits from any of these transactions [R. 868, 860].

The Situation as it Existed When Appellant Edgerton Became an Executive.

The resignation of the defendant Twombly as general manager was accepted on September 21, 1938, and the appellant Edgerton became general manager on October 19, 1938 [R. 276]; also, the defendant Twombly's services as general manager of the First Security were terminated on September 21, 1938, and the appellant Edgerton became general manager on October 19, 1938 [R. 274-275]. Shortly after the change in managers, on Decem-

ber 21, 1938, the board of directors of the Investment Finance passed the resolution that "Mr. H. Dean Campbell be employed to make an audit of the books of this company" [R. 594]. Mr. Edgerton was not a member of the board. Mr. Campbell's audit, together with the introductory report of personal conclusions and opinions, was received at the offices of the Investment Finance Company early in 1939, and at a meeting of the board of directors, March 15, 1939, a motion was passed that Mr. Campbell's "report and recommendations for the year ending December 31, 1938, be referred to our attorney who will consult with Mr. Campbell and make recommendations to the board in connection with both financial and policy matters mentioned in the report" [R. 121, 618].

The loans and investments of the Investment Finance had either been made or established prior to the appellant Edgerton becoming general manager [*supra*, pp. 31-32]. Subsequent to the report and audit of Mr. Campbell the Investment Finance Company was ultimately dissolved and its assets merged with those of the First Security, and the trust with the Metropolitan Trust Company entirely liquidated [R. 640, 532].

The Cronk Letters.

On June 24, 1937, the board of directors of the Investment Finance Company discussed the advisability of employing someone to contact the bondholders "in an effort to ascertain the advisability of liquidating the complete bond issue prior to its maturity in 1942," authorized the employment of the defendant Cronk, and the deposit of funds in a bank account to be opened in the name of

Cronk or Twombly "to cover necessary requirements for purchasing securities" [R. 277]. Thereafter, the defendant Cronk personally contacted and wrote letters to security holders during his period of employment which ended in November 1938 [*supra,* p. 25].

For the full year of 1937 Investment Finance acquired the total amount of $100,238.29 of First Security bonds at the average rate of 70.8%; for the full year of 1938 acquired First Security bonds totaling $92,057.17 at an average rate of 79%; and in 1939, $12,073.00, which comprised the entire First Security Bond issue [*supra,* p. 25].

The communications of Mr. Cronk consisted of specific offers for the purchase of a security holder's securities, *i. e.,* on October 11, 1937, he wrote the witness Wright with respect to bonds aggregating $854.20 and eleven shares of preferred, "We are able at this time to obtain for you $619.94 on same"; and on July 5, 1938, wrote her, "You hold securities of the First Security Corporation (now in process of liquidation) . . . in the amount of $854.20, and we are able at this time to obtain for you $640.65 on same" [R. 450, 453]. The witness Wright sold the bonds at this price to the Investment Finance Company on August 15, 1938 [R. 455]. Similar communications were addressed to the witnesses: Morse [R. 686], Talamantes [R. 666], Bidleman [R. 713], Robinson [R. 737], Walker [R. 745]. These witnesses all sold their securities at various times at approximately seventy-five cents to eighty-five cents on the dollar [R. 695-696, 669, 706, 709, 740, 748].

Previous to the employment of Mr. Cronk, Investment Finance Company sent a communication under date of December 5, 1936, reciting, "What is the present market

value of my First Security Deposit Corporation bonds? . . . At this time we can offer . . . a cash market . . . Should you feel that you can make better use of money at this time . . . rather than waiting and endeavoring to anticipate . . . economic events . . . between now and the time these bonds mature, we will pay you a fair price for your bonds. This is a matter strictly for your own judgment. It undoubtedly will become necessary for First Security Deposit Corporation to revamp the present operating set-up, in order to cope with rapidly changing conditions, the fall in interest rates, and increased taxes. These are conditions over which neither you nor the First Security Deposit Corporation has any control." On March 30, 1937, the Investment Finance wrote, "inquiries of Security Deposit Corporation holders to our letter of December 5, 1936 were greater than we had anticipated . . . for a limited period will pay the best cash market price available to any who desire . . . changing market conditions may affect a quotation" [R. 446-448]. In the instance of the witness Wright, she inquired on April 8, 1937, asking to be advised what the "best cash market price is" [R. 449, 450], to which the Investment replied on April 13, 1937. "Able to procure the sum of $619.94." She did not sell her securities until August, 1938 [R. 455].

Testimony Re Market Price.

The witness Wright, before she sold her securities to the Investment Finance, authorized her banker to make an investigation regarding the market value of her securities. Letters were written by her financial adviser to Los Angeles banks inquiring as to the market value of

her holdings in the First Security [R. 435-437]. The result of her investigations and those of her banker were not developed by the plaintiff, and the defendants were not permitted to develop it on cross-examination [R. 456, 435-437].

There was no evidence whatever offered by the plaintiff as to market price or value of the securities of the First Security, and all efforts of the defense to show market price were not permitted.

Plaintiff's witness Bidleman testified that he took the matter of the sale of his securities "under consideration for two to three months." When Mr. Cronk approached him and discussed the matter of the sale of his securities he told Mr. Cronk, "he didn't do business that way" . . . "I did it through the banks" [R. 718]. That he only "discussed the matter" with "the banks" . . . "I took it up with the bank in Little Falls" [R. 716]. The witness's answer that his bank made an investigation was stricken [R. 717].

Plaintiff's witness Hicks testified that aside from Mr. Cronk, a Mr. Jeffers of Long Beach sent him "some cards," and "I used to go down and talk with him . . . I had a conversation with Mr. Jeffers about the First Security in February 1938; that was before I talked with Mr. Cronk . . . Mr. Jeffers is a man who was in the commission business in Long Beach, and I used to get some cards from him" [R. 724].

Plaintiff's witness Robinson testified he had some conversations with Mr. Cronk in 1938 [R. 738], and that Mr. Cronk "told me that that price which he offered was as good a price as he could get from my securities from

any other source; I think that that was the price that was listed"; also, that "different brokers would send me a card sometimes listing what the price of it was. The price he offered me was just about the same as these brokers. I wouldn't be able to say whether the price he offered was a little bit better than the price offered by the brokers" [R. 742].

With reference to the allegation in the indictment that the defendants "did depress and cause to be depressed the market price of the securities of the First Security so that defendants might and did acquire the same at prices greatly reduced," the Court said that the allegation involved two elements: (1) That the defendants did depress the market price of securities; (2) so that defendants could and did acquire same from persons to be defrauded, at greatly reduced prices—"Now, both elements have got to be proven. You see, 'that did' is the element in that. The Government has got to prove that they did because they alleged that they did . . ." [R. 525]. Later the Court departed from this position and said the issue was, "Did they cause a *'situation'* to prevail where those securities sold for less than they would have sold had it not been for those actions, that is, sold generally in the market places of this city?" [R. 942-943].

The communications and conversations of Mr. Cronk with security holders of the First Security related to offers to buy; statements that the First Security was liquidating the assets of the Railway Mutual, that most of the assets had been liquidated and what remained was not the best that had been received, that if they did not sell their bonds they would have to wait several years (November 1, 1942) before they matured, that he was offering as

good a price as they could receive anywhere, that the offer was fair, and that he advised its acceptance [R. 451, 664, 679, 684, 701, 706, 722, 737, 745].

It was stipulated that all interest required to be paid by the First Security on its securities was paid [R. 799]. It was also stipulated that the securities, purchased from witnesses testifying respecting sale of their securities, had not yet matured at the time of sale [R. 681].

References to Liquidation Occurred Many Years After Exchange of Securities Had Taken Place.

We have noted heretofore that no representation whatsoever was made, that the First Security was organized for the purpose of liquidating the assets of the Railway Mutual to Security holders when exchange of Railway Mutual securities for those of the First Security took place [*supra,* p. 18]. No mention of liquidation occurs until 1937 in connection with the efforts of the Investment Finance Company to buy bonds of the First Security. On July, 1937, Mr. Cronk writes, "From the time of the organization of this company, it has proceeded with an orderly liquidation . . . In the natural course of events, it will be sometime subsequent to 1942 before this is accomplished . . . problematical whether the liquidation of the company should be further prolonged. Operating overhead cannot possibly be reduced as rapidly as the company income decreases . . . deemed advisable to contact . . . bondholders for the purpose of obtaining their recommendations with reference to future company policy . . . in near future, I will call upon you . . . or see you at this office" [R. 665]. On October 31, 1938, defendant Cronk wrote "The undersigned is

completing his work in connection with the liquidation of the First Security Deposit Corporation on November 25, 1938. Under the circumstances, this will be my last communication to you in connection with this matter" [R. 667-668]. The person to whom this communication was addressed did not sell her bond to either the Investment Finance or First Security. The bond matured and was paid in full on May 2, 1939 [R. 669].

On December 31st, the defendant Cronk wrote plaintiff's witness Morse, "You will recall that the First Security Corporation was organized to liquidate a large portion of the assets of the old Railway Mutual Building and Loan Association over a period of time . . . It is my understanding had this not been done, the situation would in all probability have been liquidated under a forced liquidation, etc., by the Building and Loan Commission." This witness did not sell his bonds, but held them until they matured in July 1939, when he received the full face value plus interest therefor [R. 691].

On July 27, 1938, the defendant Cronk wrote the plaintiff's witness Bidleman, "The First Security . . . was organized . . . to handle the liquidation of the assets of the old Railway Mutual . . . and it is my understanding had this not been done, the assets would have been liquidated by a receiver appointed by the building and loan commissioner at that time. This corporation is now in the final stages of this liquidation . . . these bonds are due in 1942, and under the trust indenture they have an additional . . . twenty-two months, which would be about the middle of 1944. In my opinion, the thing for you to decide is whether it would be to your advantage to cash these bonds . . . or wait that length

of time with the chance of realizing any more out of what is left of the assets after more than $1,000,000.00 worth of assets have been liquidated" [R. 706].

On July 19, 1938, the American National Bank, on behalf of the witness Wright, wrote to the First Security that, "She had been informed First Security in process of liquidation and she has had an offer for her securities . . . advise us if . . . liquidating. . . . If she should sell . . . on the marekt at present time, can you tell us about what she should receive for them?" On August 3, 1938, the First Security replied, "This corporation is conducting a process of liquidation . . .; the bulk of its assets consisting of trust deeds acquired during the inflation period of the late nineteen twenties, and of real estate acquired through foreclosure of such trust deeds. . . . Aim of the company to complete its liquidation. As to whether its security holders should retain, or dispose of, our securities, this company has no advice to offer . . ." [R. 869-870].

The Court treated the issue of liquidation as follows: "He (plaintiff) is entitled to show . . . that contrary to the representations made by these men to investors, instead of liquidating, they made investments in . . . various organizations, and it doesn't make any difference who controls it. The point . . . is not that they were making investments to themselves, directly or indirectly, but that they weren't liquidating, they were investing in oil wells or banks . . ." [R. 813].

Plaintiff's witness Drozda, testified that "The major part of my work was in liquidating the real estate that the company had acquired during the second period of employment with the First Security" [R. 399]. Drozda

was employed on this occasion from March 1933 until November 1934 [R. 404, 409, 399]. The policy of the company in this respect was reflected by Exhibit 94 [*supra,* p. 24, R. 320]. The Realty Deposit was a department of First Security engaged in disposing its real estate [*supra,* p. 23]. The Trust with the Metropolitan Trust was entirely liquidated by 1939. and was substantially liquidated prior to Cronk's employment [*supra,* p. 24].

There Was No Evidence of Any Conversion.

There was no evidence that any of the defendants benefited in the slightest by any of the investments or business transactions of the Investment Finance Company. As to the appellant Edgerton, there was no evidence that he was an owner of any stock in any of the concerns in which the Investment Finance Company owned stock or had invested any money; there was only evidence that he and the defendant Twombly had a stock interest in the Pierce Petroleum Company acquired long after the creation of any obligation between it and the Investment Finance. Ultimately, the Investment Finance was dissolved and all of its assets taken over by the First Security. The First Security and the Investment Finance had identical offices and maintained joint offices. The Investment Finance was the creature of the First Security and actually, for all practical purposes, was the subsidiary of the First Security.

The powers granted under the Reorganization Plan, Agreement, and Declaration of Trust were broad enough to permit these activities on the part of the First Security, *i. e.,* to organize the Investment Finance Company, loan it money and assets in exchange for cash and its own securities.

Collateral Transactions.

The plaintiff was permitted to show the organization and activities of a wholly collateral company known as R. F. D. Discount Company (name later changed to Consolidated Investment) over the objections that this evidence was in no wise connected with the scheme alleged in the Indictment [R. 248, 140, 142, 148, 410, 411, 414, 424, 475, 476, 480, 481, 505, 543-545, 552, 555, 556, 833, 909, 915]. This company was organized February 7, 1934 by the defendants Starr, Smale, Thomas, Ireland and Edgerton, and Messrs. Leffert, Johnson, Brayton, Anderson and Barry, all of whom with the exception of Mr. Edgerton were directors in the Railway Mutual and the First Security. Its purpose was to pool their various investments in securities of other corporations and their resources in one joint fund; and to pool their present voting strength of shares of stock held by them in the Railway Mutual and the First Security [R. 834, 839]. The corporation did not plan to do an active business of any kind [R. 835, 839]. They sought the issuance of stock of the company to be exchanged at par for Railway Mutual and First Security stock at par, for bonds issued by the First Security at par, and for services rendered to the corporation in an amount to be determined by the Board of Directors from time to time [R. 837-838].

Of the 75,000 shares of common, par value of $1.00 a share, the appellant Edgerton received 131 shares for Collateral Trust Bonds of the First Security, 20 shares for one share preferred stock of the First Security, and 520 shares for services rendered to the corporation; or an aggregate of 671 dollars par value of R. F. D. shares.

The other nine individuals named were to receive in the main 7500 shares in exchange for various classes of bonds and preferred and common stock of the First Security Corporation [R. 847-849, 854]. Those not acquiring the full 7500 shares by an exchange could acquire the difference for cash [R. 847-850].

The stock of the R. F. D. Corporation was held, under the Corporation Commissioner's Permit, in escrow. The report of the escrow holder showed that as of July 20, 1934 stock was standing in the names of these various individuals in the aggregate amount of 33,566 shares, of which 993 shares were in the name of appellant Edgerton and his wife [R. 242, *et seq.*]; and, as of March 10, 1936 there were 575 shares in the name of the appellant Edgerton [R. 244].

The Investment Finance Company Board of Directors on November 9, 1939 passed a Resolution to purchase for $36,000 the assets of the R. F. D. (Consolidated). These assets consisted of shares of common and preferred of the First Security and securities of the Railway Federal Savings and Loan Association [R. 547]. Thereafter, over a period of time from December 29, 1936 down to July, 1937, the Investment Finance paid in installments to the R. F. D. (Consolidated) said $36,000.00. As the installments were received, the R. F. D. issued its checks to its various stockholders on a pro-rata basis, the distribution being "upon dissolution at rate of $1.00 per share" [R. 143-156].

It was stipulated that these checks were received by the stockholders of the R. F. D. (Consolidated) in the aggregate amount of $36,000.00, and were in turn re-trans-

ferred to the Investment Finance Company and deposited in the account of the Investment Finance Company [R. 143]. The appellant Edgerton received a check in the amount of $1,666.00 from the R. F. D. (Consolidated) and endorsed the same over to the Investment Finance Company [R. 149]. When the payments of the $36,000.00 were being made the R. F. D. (Consolidated) was in process of dissolution [R. 163].

The plaintiff's witness Bruce testified that the stock register of the Investment Finance Company reflected stock issued in the names of the several stockholders of the R. F. D. (Consolidated) in amounts of approximately the equivalent of the amounts of the checks transferred to Investment Finance and that the stock was issued shortly after such transfer of the checks [R. 567].

The Court, over objection, permitted evidence of a collateral transaction involving the R. F. D. relating to the refinancing by Reed Bros., Tapley, Geiger and Company of its loan. This company originally had negotiated a loan secured by trust deed for $44,000.00 with the Railway Mutual which later was renewed by the Railway Mutual. This trust deed was acquired by the Metropolitan Trust under the order of segregation and division of assets of the Railway Mutual on December 29, 1933. At that time it was in default both in principal and interest payments for more than eight months. Mr. Reed had entered into an agreement with a third person to refinance this mortgage for the sum of $22,000.00, which arrangement expired. Mr. Reed then made a similar offer to the R. F. D. through the appellant Edgerton. The R. F. D., in turn, made an offer to the First Security to pay $17,800.00 in cash for the Reed loan, which was accepted.

The R. F. D. deposited bonds in an amount of ten per cent in excess of the face amount of $44,000.00 of the Reed loan, with the Metropolitan Trust, whereupon the Reed loan was deposited in the escrow established by the Reed Company and the R. F. D., to be surrendered and cancelled upon the payment of $17,800.00 in cash to the First Security and the balance to the R. F. D. The appellant Edgerton, in connection with his activities in this transaction, was paid $1,000.00. Aside from this sum, he received for his services for a period of three years $250.00 from the R. F. D. [R. 473, *et seq.,* 165].

Hearsay Accusatory Statements.

The Court permitted, over proper objections and exceptions, the plaintiff to introduce in evidence a statement made by the defendant Twombly to a post office inspector some time after he left the First Security and Investment Finance. This statement was admitted in evidence as to the state of mind and intent of the defendant Twombly. The statement is but a "screetch" by Twombly against the appellant Edgerton, exculpating himself and inculpating Edgerton. There was also admitted in evidence over proper objection and exception a portion of the report of the auditor H. D. Campbell, which expressed his personal conclusions and opinions concerning activities of the Investment Finance.

Also, there were numerous assignments of misconduct as to the actions and statements of both the trial court and counsel for the plaintiff.

In summary, the facts in evidence disclose:

1. The organization of the First Security (as a general mortgage and loan company) by the officers and directors of the Railway Mutual for the purpose of taking over a portion of the assets of the Railway Mutual.

2. The exchange by approximately 80% of the security holders of the Railway Mutual of their securities in that association for those of the First Security without any representations having been made as alleged in the indictment.

3. The retirement of all of the securities of the First Security and the liquidation of the trust with the Metropolitan Trust Company.

4. The liquidation of the assets received by the First Security from the Metropolitan Trust in exchange for its own securities at 10% in excess of the book value of the assets released.

5. The organization of the Investment Finance by the First Security and sundry investments by the Investment Finance; and the ultimate dissolution of Investment Finance and the acquisition of its assets by the First Security.

6. The acquisition both by the First Security and the Investment Finance of securities of the First Security below par, but not below market price.

7. The solicitation in 1937 and 1938 by the Investment Finance to purchase securities of the first security holders, during which time the Investment Finance made representations, which were true, that the First Security

had liquidated a substantial portion of the assets of the Railway Mutual and was liquidating the remainder thereof.

Upon this state of the record as to facts in evidence the plaintiff rested, and the defendants likewise did so.

The Questions Presented.

Upon this record, the basic contentions of the appellant Edgerton are as follows:

(a) That the trial court not only amended the indictment, but did so with respect to a vital and material allegation.

(b) That the evidence is insufficient to establish the scheme and artifice pleaded in the indictment.

(c) The trial court improperly submitted the issue as to whether defendants did depress and cause to be depressed the market value of securities.

(d) That the admission of the Twombly accusatory statement in evidence was erroneous and greatly prejudiced the rights of the appellant Edgerton.

(e) That the admission in evidence of the hearsay *ex parte* opinions and conclusions of H. D. Campbell was erroneous and greatly prejudiced the rights of the appellant Edgerton.

(f) That the misconduct of the trial court and counsel for plaintiff was greatly prejudicial to the rights of the appellant Edgerton.

(g) That the trial court improperly restricted the cross-examination of certain of plaintiff's witnesses on the issue of market price.

(h) That evidence of collateral transactions was erroneously admitted.

Assignments of Error Upon Which Appellant Edgerton Will Rely.

I.

Assignment XII [R. 1057-1060; Appendix p. 1].*

The trial court erred in overruling appellant's motion for an order arresting judgment on the grounds that (a) the purported verdict returned by the jury is not a verdict based upon the indictment returned by the Grand Jury, (b) the Court had no jurisdiction to impose judgment and sentence upon an indictment amended by him, and (c) that he altered and amended the Indictment by striking therefrom the language contained therein "theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations."

II.

Assignment XIII [R. 1060-1062; Appendix p. 3].

The District Court erred in instructing the jury that the following words of the Indictment, "Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California" are deleted.

III.

Assignment I [R. 1051-1053; Appendix p. 5].

The District Court erred in denying the motion made by the appellant Edgerton at the close of the plaintiff's case and renewed at the close of all of the testimony in the case, to dismiss Count I of the Indictment.

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*Wherever an assignment is printed in the appendix, we have at that point also included record references to the Bill of Exceptions showing the pages where the subject matter appears.

IV.

Assignments II, III, IV, V, VI, VII, VIII, IX, X, and XI [R. 1053-1057]; Bill of Exceptions [R. 944-946].

The District Court erred in denying the motions made by the appellant Edgerton at the close of the plaintiff's case and renewed at the close of all of the testimony in the case, to dismiss Counts II, IV, V, VI, VII, VIII, IX, XI, XII, XIII and XIV. Each of these Counts pleads the identical scheme and artifice to defraud pleaded in Count I, with the exception that a different indictment letter was pleaded in each count. The question of the insufficiency of the evidence as to each of these counts is the same as that relating to Count I which is the basis of Assignment I. The appellant was sentenced to a term of imprisonment on each of Counts I, IV, VI, VIII, XI and XIII, the sentence so imposed on each count was made to run concurrently with each other. On Counts II, V, VII, IX, XII and XIV, the Court placed the appellant on probation.

V.

Assignment XV [R. 1063]; Bill of Exceptions [R. 1038, 1041].

The District Court erred in refusing to charge the jury as requested by the appellant concerning the absence of evidence to prove market price, or prices, and the failure to prove the defendants "did depress or cause to be depressed, the market price."

VI.

Assignment XXIX [R. 1140-1172; Appendix p. 7].

The District Court erred in admitting into evidence over objections and exceptions of appellant, Plaintiff's Exhibit 216, and in denying his motion to strike said exhibit. This is the defendant Twombly's statement exculpating himself and inculpating the appellant Edgerton.

VII.

Assignment XXX [R. 1173]; Bill of Exceptions [R. 774-786-788, 944].

The District Court erred in denying the motion of the appellant Edgerton for a severance, made at the time of the offer of Plaintiff's Exhibit 216 in evidence and renewed at the conclusion of all of the evidence in the case.

VIII.

Assignment XXXI [R. 1173]; Bill of Exceptions [R. 788, 944].

The District Court erred in denying the motion of the appellant Edgerton for a mis-trial because of the introduction and receipt in evidence of Plaintiff's Exhibit 216.

IX.

Assignment XXV [R. 1091-1098; Appendix p. 34].

The District Court erred in admitting in evidence over the objections and exceptions of the appellant, Plaintiff's Exhibit 46, and in denying a motion to exclude the portion thereof containing hearsay *ex parte* comments, opinions, and conclusions of the author.

X.

Assignment XXVI [R. 1098, 1108; Appendix p. 41].

The District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of plaintiff during his closing argument to the jury and in his comments with respect thereto.

XI.

Assignment XXVII [R. 1108-1134; Appendix p. 49].

The District Court erred and was guilty of misconduct prejudicial to the appellant in requesting, suggesting, and intimating that the defendants should stipulate to certain facts rather than requiring the plaintiff to prove the same.

XII.

Assignment XXVIII [R. 1134-1140; Appendix p. 71].

The District Court erred and was guilty of misconduct prejudicial to the appellant Edgerton before the jury.

XIII.

Assignment XX [R. 1068-1072; Appendix p. 76].

The District Court erred in permitting the plaintiff to argue to the jury during the course of its closing argument, and in so stating himself, that the defendants misrepresented to investors the manner in which their money would be invested, in the absence of any evidence of such a representation.

XIV.

Assignment XXIII and Assignment XXIV [R. 1083-1090; Appendix pp. 80, 84].

The District Court erred in sustaining objections of the plaintiff to certain questions propounded on cross-examination to plaintiff's witnesses Wright and Richmond concerning their respective activities in ascertaining the market price of the securities of the witness Wright and their knowledge as to the market price of those securities.

XV.

Assignments XXXIV to XXXIX, inclusive [R. 1176-1189; Appendix pp. 86-96].

The District Court erred in admitting evidence of collateral transactions.

ARGUMENT.

POINT I.

Assignment of Error XII.

The Trial Court Erred in Amending the Indictment by Deleting Therefrom a Portion of the Language Thereof Descriptive of the Type of Investments Which It Was Alleged Defendants Represented Would Be Made.

Assignment XII assigns error in the action of the District Court in overruling appellant's motion for an order arresting judgment on the grounds that:

(a) The purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury,

(b) The Court had no jurisdiction to impose judgment and sentence upon an indictment amended by him,

(c) The Court altered and amended the indictment by striking therefrom the language contained therein, "Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations."

The assignment relied on is printed in full in the appendix herein at page 1, *et seq.*

The ruling to which the said assignment relates appears in the Bill of Exceptions at page 1045 of the record.

The motion and proceedings to which said ruling relates appear in the Bill of Exceptions at pages 1043-1045 of the record.

The allegation of the indictment was:

> "That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties *theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California;* whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever." [R. 9.]

The foregoing paragraph constituted one of the two representations alleged in the indictment as false. The only other false representation alleged was one to the effect that First Security was organized to, and actively engaged in, the liquidation of the assets received from the Railway Mutual. No other misrepresentations were charged. The representation, before the deletion ordered by the Court, charged that loans would only be made on securities or properties approved as legal investments. After the deletion ordered by the Court, the representation was simply that invesements would be made upon securities or properties.

The Court's instruction to the jury upon the submission of the case was as follows:

> "You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit: 'theretofore approved as legal investments by the Superintendent of Banks

or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading, as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'" [R. 1000.]

The Court further instructed the jury:

"I have already told you that I would strike out a certain portion of the allegation which is in the indictment, being the first paragraph thereof of page 5. I strike out that portion which says:

'. . . theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California. . . .'

I shall refer to that later." [R. 991-992.]

Ever since the decision in *ex parte Bain*, 121 U. S. 1, the rule has been firmly settled in the Federal courts that no power exists in the trial court to alter, amend, delete, or add to an indictment presented by a grand jury, and that a conviction upon such an amended or altered indictment is void.

This Court, in the case of *Stewart v. U. S.* (C. C. A. 9), 12 Fed. 524, 525, had occasion to consider this precise question, and held that where an indictment for the

crime of smuggling charged that defendants did knowingly, willfully, unlawfully, and feloniously, etc., and with intent to defraud, etc., bring into the United States certain intoxicating liquors, it was fatal error for the trial court to strike out as surplusage the word *"feloniously."* This Court said:

> "At the commencement of the trial, by consent of counsel for all parties, the court struck from the body of counts 2 and 3 of the indictment, as surplusage, the words 'feloniously and' in one place, and the words 'and feloniously' in another. This action on the part of the court is now assigned as error. The assignment is well taken. In *ex parte Bain,* 121 U. S. 1, 13, 7 S. Ct. 781, 787 (30 L. Ed. 849), the trial court struck six words from the indictment, as surplusage, and in discharging the petitioner on habeas corpus the Supreme Court said:
>
> 'It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed,

the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. . . . the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. . . . The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence.'

In the course of the opinion there is some discussion of the question as to whether the grand jury would have returned the indictment with the stricken words omitted, but an examination of the entire opinion shows very clearly that the decision was based upon the broad ground that under English and American law no authority exists in a court to amend any part of the body of an indictment, without reassembling the grand jury, unless by virtue of statute.

In Dodge v. United States, 258 F. 300, 169 C. C. A. 316, 7 A. L. R. 1510, certain words were likewise stricken from the indictment as surplusage, and, in holding that such action on the part of the court avoided the indictment, the Circuit Court of Appeals for the Second Circuit said:

'At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word 'mutiny' from the first paragraph of the second count. Counsel for defendant at once said: 'No objection.' The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted. The rule is almost universally recognized, both in this country

and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.' . . .

So here the amendment of the indictment avoided the second and third counts, but did not affect the convictions under the remaining counts unless some other error intervened."

In the case of *ex parte Bain, supra,* 121 U. S. 1, 5, 9, the indictment charged a violation of the statute making it a crime to give any false report or statement of the banking association with intent to injure the association or any other company or individual or to deceive any officer of the association or any agent appointed to examine the affairs of such association. The indictment charged an intent to deceive the *comptroller of the currency* and the agent appointed to examine the affairs of said association and to injure, etc., etc., the United States, etc. Upon demurrer, the trial court had ordered the italicized words deleted. The conviction was set aside on *habeas corpus,* the Supreme Court holding that the indictment on which defendant was tried was not the indictment of the grand jury. There was nothing before the Court on which it could hear evidence or pronounce sentence.

The rule of the case of *ex parte Bain* has never been departed from and was reaffirmed by the Supreme Court in the case of *U. S. v. Norris,* 281 U. S. 619-622, 74 L. Ed. 1076, 1077, where the Court held that a stipulation of facts was ineffective to import an issue as to the sufficiency of the indictment or an issue as of fact upon the

question of guilt or innocence after plea of *nolle contendere,* the Court saying:

> "If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. *Ex parte* Bain, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781, 16 Am. Crim. Rep. 122. If filed before plea and given effect, such a stipulation would oust the jurisdiction of the court."

It has been held that the district attorney, where an indictment is attacked as duplicitous, may not elect to rely upon one of the defenses charged and *nolle pros.* the others, as this would in effect constitute an amendment of the indictment. *U. S. v. Dembowski,* D. C. Mich., 252 Fed. 894-898:

> "It seems clear that, if the District Attorney is permitted to *nolle pros.* a portion of this indictment, he will thus, in effect, be permitted to amend it, because, in that event, the indictment on which the defendant is tried will not be the same as that found by the jury. . . . To amend is to 'free from error'; to 'remove what is erroneous, superfluous, faulty, and the like.' 2 Corpus Juris, 1317. In Words and Phrases, vol. 1, First Series, at p. 368 *et seq.,* and in vol. 1, Second Series, at p. 199 *et seq.,* numerous authorities are cited and quoted showing that an amendment may consist of either the addition to, or the withdrawal from, a pleading or document of a part thereof."

In *Naftzger v. U. S.* (C. C. A. 8), 200 Fed. 494, 496-497, it was held that although it was unnecessary that the indictment for receiving stolen stamps should have specified that they were stolen from "certain post offices in the State of Kansas," nevertheless the indictment having so specified, the descriptive words could not be stricken as surplusage. The Court said:

> "Counsel for the government contend that the recital of the indictment that the stamps were stolen from 'certain post offices in the state of Kansas' is surplusage, and need not be proven, and that it sufficed if made to appear that they were stolen elsewhere from the government. We are of the opinion that, if the allegation had omitted the words quoted, it would have been sufficient; but, having been alleged, the evidence must conform to and support the allegation. The return of an indictment is the work of the grand jury only—a co-ordinate branch of the court."

After referring to *ex parte Bain* the Court said:

> "It was conceded that there was no necessity to allege that the Comptroller was deceived, as we concede that it would be a crime to knowingly receive stolen stamps from wheresoever stolen from the Government. But it is alleged that the stamps were stolen within the state of Kansas.
>
> An indictment is for the purpose of conferring jurisdiction and advising the court of the charge, and to advise the defendant of what he must meet; and if, after thus advising the defendant that the stamps were stolen in Kansas, the government can be allowed to show that they were stolen in some other state, such an allegation is misleading, and can be used as a snare to deceive a prisoner."

In all the foregoing cases the matters deleted were not in themselves substantial or material, except that the grand jury, in framing the indictment in those particular terms, had constituted such terms material.

In the present case, the portions deleted constitute a very material and vital portion of one of the two misrepresentations charged. The indictment, as found by the grand jury, charged that the representation was made that the funds would be invested in securities and properties approved as legal investments. As amended by the Court, the representation was merely that the money would be invested in securities or properties—without any reference to whether the securities or property were to be approved as legal investments. The prosecution wholly failed to prove that any representation whatever had been made that the money would be loaned or advanced only upon securities so approved. (Point III, *infra,* p. 67.) It was to meet this defect in proof that the Court deleted that portion of the representation as found by the grand jury and permitted the jury to convict upon the finding of a different and lesser representation.

While, under the rule of *ex parte Bain* and cases cited, it is not necessary that an amendment be as to a material or substantial matter in order to invoke the rule which renders the trial court powerless to amend the indictment as found by the grand jury, it is obvious in the present case that the amendment was in a substantial and material particular.

This Court, in *Barnard v. U. S.* (C. C. A. 9), 16 Fed. (2d) 451, 453, has pointed out that:

> "The very essence of the crime consists in the making of false promises which the parties never in-

tended to perform, or false representations which they never intended to make good."

Therefore, in amending the promise or representation as charged by the jury, the trial court amended the indictment in a matter going to the very essence of the crime. As is hereafter pointed out, in authorizing and instructing the jury to convict upon proof of a representation falling short of that charged in the indictment, the Court violated the elemental rule of substantive law that falsity of a particular representation as an entirety must be shown.

Even in a civil case it is held that proof of the making of only a portion of the representation charged is such a substantial variance as to defeat recovery. The representation must be proved in its entirety. Proof of only a portion of the representation is as ineffective as a total failure of proof.

27 Corpus Juris, p. 42, sec. 166.

See also:

Sacramento Suburban etc. Co. v. Stern (C. C. A. 9), 36 Fed. (2d) 928, 929. (*Infra,* p. 68.)

The damaging effect of the trial court's order striking that portion of the representation relative to the character of the securities is at once apparent, for the trial court had permitted evidence as to a variety of investments over a long period of time which were entirely immaterial to any issue except the issue presented by the charge that money would be advanced only upon approved legal investments, and this was the ground upon which the trial

court admitted this evidence of numerous collateral transactions and he so instructed the jury.

> "The Court: The amount of the investment is material. Beyond that I am not interested, and there being no showing that the directors here were involved in it, it is simply under the one matter alleged in the indictment, namely, that this corporation invested in other than securities which were indicated in its representation."
>
> "Mr. Lawson: As I understand Your Honor, it is limited to that part of the indictment that says that they represented that the investments would be legal investments.
>
> The Court: That is the reason it is being permitted to go in evidence." [R. 857-858.]

And at the conclusion of the trial:

> "The Court: Well, the reason which I have announced, gentlemen of the jury, for admitting this evidence into the record is, it seems to me, material on account of the indictment, at least under the allegations which, in effect, say that money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department, and that I am permitting this evidence to go as being material to the plaintiff's case in connection with that allegation of the indictment." [R. 861.]

After the evidence had been closed, during the argument on motion for directed verdict in the absence of the jury, the Court emphasized that there was no evidence in the record that any false representation was made that the loans would be made on approved legal investments.

At this stage of the case, the Court stated with reference to the showing as to a misrepresentation that the loans would be secured by approved legal investments:

> "The Court: Suppose they made the representation: There is no proof in the record that they were false. So whether they made the representations or not might not be material, as there is no proof that that was not true.
>
> Mr. Lawson: Then it must be admitted that there was no such representation, that is, of a false character made with reference to that subject matter.
>
> The Court: It must be proved. Under the present state of the record, there is no proof that that representation was false. * * * So, therefore, there is no evidence in this record as to the falsity of those representations." [R. 936, 937.]

Manifestly, it was to fit this defect in proof that the indictment was amended to omit the charge that the representation was that the money would be loaned or advanced only on approved legal investments. The Court's amendment was made after all the proof was in and during the course of his formal instructions to the jury.

After so amending the indictment, the trial court instructed the jury that proof of any one of the two false representations would authorize a verdict of guilty. The Court authorized a verdict of guilty upon a finding that defendants devised or intended to devise a scheme to defraud "by means of at least one of the false representations, pretenses, or promises * * *" [R. 999.]

POINT II.

Assignment of Error XIII.

The District Court Erred in Instructing the Jury That Certain Portions of the Indictment Were Stricken and Were to Be Disregarded and the Indictment Should Be Read as Though Said Words Had Been Stricken.

Said Assignment of Error is printed in full in the appendix at page 3 and succeeding pages.

The instruction to which said assignment relates appears in the Bill of Exceptions at page 1000 of the record. The exception to said instruction appears at pages 1038-1040.

The character of the amendment made by the Court by deletion is shown in the preceding point and the argument there advanced is applicable to the ruling to which this exception relates and is adopted as the argument addressed to this Assignment of Error.

POINT III.

Assignment of Error I.

The District Court Erred in Denying the Motion Made by the Appellant Edgerton at the Close of the Plaintiff's Case and Renewed at the Close of All the Testimony in the Case, to Dismiss Count 1 of the Indictment.

Said Assignment of Error appears in full in the appendix hereto at page 5 and succeeding pages.

The motion referred to in the foregoing assignment and the ruling of the Court thereon appear in the Bill of Exceptions at pages 927, 944, 945, and 946 of the record.

The appellant was convicted only on counts of the indictment charging substantive offenses. All of these counts are identical with the exception of the Indictment letters. The grounds upon which Count I is challenged as to insufficiency of the evidence are the same grounds upon which the remaining counts are challenged.

We shall present the argument relating to this assignment under the following topics:

(a) There is no evidence to sustain the allegation that it was falsely represented that the First Security did loan money only upon security on properties approved as legal investments.

(b) That there is no evidence to sustain the allegations that it was falsely represented or pretended that the First Security was organized for the purpose of, and actively engaged in, the liquidation of the assets received by it from the Railway Mutual.

(c) That there is no evidence to sustain the allegation that the defendants did depress and cause to be depressed the market price of the securities of the First Security.

(d) That there is no evidence to sustain the allegation that defendants did convert and divert to their own use, benefit, and profit, large sums of money and property of the First Security, under the pretense of loans; or for that matter, by any other means or method.

(a) There Is No Evidence to Sustain the Allegation That It Was Falsely Represented That the First Security Would Loan Money Only Upon Securities on Properties Approved as Legal Investments.

This is one of the two false representations pleaded in the indictment and the one which the Court amended.

We have shown that the Plan, Agreement and Declaration of Trust for the reorganization of the Railway Mutual had been conceived, the securities exchanged, and the Plan declared effective approximately two years prior to the time Mr. Paul Nourse, for whom the appellant Edgerton worked, became attorney for the First Security; and that there was not a scintilla of evidence that any representation was ever made to anyone that the First Security would advance and loan money only upon securities and properties approved as legal investments. We have also shown there is a total lack of evidence that the appellant Edgerton had any knowledge that the Plan contained any such statement of the business purpose of the First Security (*supra,* pp. 8-21).

The only evidence concerning any representation as to the purpose of the First Security was that it was organized to operate as a mortgage company in order that it could function with the general advantages of a mortgage company under the law unburdened with the legal restrictions of a building and loan association. These representations are not charged in the indictment as being false. Again, there isn't the slightest evidence that the appellant Edgerton ever had any knowledge of such representations (*supra,* pp. 14-16).

The trial court at the conclusion of all of the testimony in the case stated that there was no proof that the defend-

ants *falsely* represented that the First Security would only advance or loan money on securities or properties approved as legal investments [R. 936-937].

To cover this defect in proof the trial court authorized the jury to convict even though there was no proof of the falsity of this element of the representations (*supra,* Point I, pp. 54, 64).

Fraud must be specially pleaded. An actionable misrepresentation consists of a false statement of a material fact (in a criminal case the proof must also show that the statement is knowingly false). Plaintiff must prove the making of the particular false statement alleged, otherwise a variance results.

In Sacramento Suburban, etc., Co. v. Sterm (C. C. A. 9), 36 Fed. (2d) 928, 929, this court said:

> "The alleged fraud consisted of misrepresenting the value of the land, relied upon by the appellee, and the representation that the land was 'rich and fertile, capable of producing all sorts of farm crops and products, and that said land was entirely free from all conditions and things injurious or harmful to the growth of fruit trees, and that the said land was perfectly adapted to the raising of fruits of all kinds.'
>
> The appellant requested an instruction, No. 14, to the effect that the plaintiff could only recover upon the proof of the false representations alleged in the complaint and not for other false representations. This was a proper instruction, and the court, after stating the alleged fraud in the terms of a complaint, instructed the jury in effect that, if it was shown that the land was not capable of raising fruit in commercial quantities as represented in the appel-

lant's book, plaintiff could recover. For illustration, the court instructed the jury as follows:

'So, gentlemen of the jury, taking the plaintiffs' evidence, and the defendant's evidence, in respect to the adaptability of the land for commercial orcharding, if you find by the greater weight of the evidence that this land is not adapted to commercial orcharding, and is not worth $350. an acre, then you proceed to the next step.' Judgment reversed."

To the same effect is:

Brandom v. McCausland (C. C. A. 8), 171 Fed. 402, 404;

27 Corp. Jur., pp. 40, 41, Section 165. (See *supra,* p. 61.)

The holding of the court in *City Loan and Banking Co. v. Byers* (Ala.), 55 So. 951, 952, is directly in point here.

"The allegation of the falsity of the one alleged representation as an entirety is descriptive of the total complained of, and is not sustained by proof of the falsity of only a part of such representation. (Citing cases.) No evidence was offered tending to prove the falsity of the part of the representation alleged to the effect that the defendant had given no security for any one, or of the part of such representation to the effect that the defendant had not made any assignment of his wages or salary. These were material parts of the representation upon the truth of which the plaintiff claims that it relied in making the loan to the defendant. In this state of events, the plaintiff was not entitled to recover, because of its failure to prove material averments of its complaint."

(b) There Is No Evidence to Sustain the Allegations That It Was Falsely Represented or Pretended That the First Security Was Organized for the Purpose of, and Actively Engaged in, the Liquidation of the Assets Received by It From the Railway Mutual.

This is the second, and only other, false representation pleaded in the indictment.

We have shown that there is no evidence whatever that investors in the Railway Mutual exchanged their securities for those of the First Security upon any representation that the First Security was organized for the purpose of liquidating the assets of the Railway Mutual (*supra,* pp. 15, 18, 37).

It is important to note the exact language of the continuing false representation, *i. e.,* "that the First Security was organized for the purpose of and was duly and actively engaged in the liquidation of" the assets "received by it *from* the Railway Mutual." The First Security received its assets from the Metropolitan Trust Company upon the surrender of its own obligations for cancellation in an amount of 10% in excess of the book value of assets received. We have shown that the trust was entirely liquidated and that, as a matter of fact, the First Security was duly and actively engaged in the disposition of physical assets so received by it from the Metropolitan Trust contemporaneously with the distribution of the physical assets of the Railway Mutual to the Metropolitan Trust in 1934 and from thence forth (*supra,* pp. 20-24, 40).

As we have seen, nothing was represented to anyone with respect to the First Security being organized for the purpose of liquidating the assets of the Railway Mutual until approximately six years after the Plan, Agree-

ment and Declaration of Trust had been executed. These representations were contemporaneous with the employment of Mr. Cronk in July of 1937, after most of the obligations of the First Security had been retired and most of the trust had been liquidated. Such representations *only* were made in connection with inducing holders of securities of the First Security to sell the same to the Investment Finance. What evidence there was on the subject of market price showed that these securities were acquired by the Investment Finance at not less than market price (*supra,* pp. 36-38).

The plaintiff utterly failed to show that any of the securities so acquired by the Investment Finance during the period that this representation was currently made ever acquired any securities from any security holder at less than market price. In no way does the evidence show that this representation, false or true, in any wise resulted in any security holder being defrauded. Further, that part of the representation currently made during Mr. Cronk's employment by the Investment Finance that the First Security was liquidating the assets of the Railway Mutual was not shown to be false. On the contrary, the evidence we have seen shows that from 1934 on the First Security obtained physical assets from the Metropolitan Trust upon surrender of these very securities for cancellation; and, thereafter, the liquidation of said assets (*supra,* pp. 36-41).

These representations occurring as they did some six years following the execution of the Plan, Agreement and Declaration of Trust, and the exchange of the Railway Mutual securities for those of the First Security, even if we assume them to be false, does not present sub-

stantial proof of the scheme and artifice pleaded. The proof must fairly establish substantially the scheme and artifice pleaded. The scheme and artifice pleaded had its inception in the exchange of the securities of the Railway for those of the First Security.

See cases, subhead (a), *supra,* pages 68-69.

In *Haas v. United States* (C. C. A. 8), 93 Fed. (2d) 427, 434-435, under an indictment charging defendant directors with a scheme to defraud, by obtaining, by false pretenses, a secret profit from the Foresters in connection with the merger of two fraternal benefit societies, proof that defendants were to obtain, by concealment of facts which they were obligated to disclose, a secret profit from one Parks, a broker, was held to constitute a fatal variance.

The Court said:

> "Whether the breach of trust of which the defendants who were clearly guilty in Modern Brotherhood were clearly guilty in concealing what it was their duty to disclose, thereby obtaining for themselves money from Parks which the law would not permit them to convert to their own use, would be a scheme or artifice to defraud under section 215, Criminal Code, 18 U. S. C. A. 338, provided the mails were used in executing or attempting to execute the scheme, it is not necessary to determine, since the scheme which was proved was not, in any event, the scheme which the government alleged in the indictment.

In Brown v. United States, 8 Cir., 146 F. 219, on page 220, this court said:

'The purpose of requiring a description of the scheme to defraud in the indictment is to definitely and clearly inform the accused of the scheme charged against him so as to enable him to make his defense. Brooks v. United States (C. C. A.), 146 F. 223, decided at this term, and not yet officially reported; Stewart v. United States, 119 F. 89, 94, 55 C. C. A. 641; United States v. Hess, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516.

'It follows that one must be convicted, if at all, on the scheme as alleged and if the scheme as alleged is not substantially established by the proof he cannot be convicted.'

See also, Gammon v. United States, 8 Cir., 12 F. 2d 226, 228, and Rude v. United States, 10 Cir. 74 F. 2d 673, 677."

In *Brown v. United States* (C. C. A. 8), 146 Fed. 219, 220, 222, the scheme charged was to obtain money for the purchase of commodities on some board of trade, defendant to operate as broker, defendant not intending to make actual purchases. The transactions proved were sales of options from defendant to a customer and not a purchase made on a board of trade for him.

This was held to be a fatal variance.

In *Smith v. United States* (C. C. A. 8), 83 Fed. (2d) 631, 640, the indictment charged that defendant assisted and rendered assistance to a veteran in the preparation and execution of the necessary papers in the presentation to the United States Veteran's Administration of a disability claim and unlawfully charged an excessive fee for such assistance (p. 639). The proof showed the preparation

and filing of a mandamus action in the District of Columbia against the Veteran's Administration.

After pointing out that the pleader had "thus set out a description of the specific means by which the offense was consummated," the Court held that a fatal variance resulted, saying:

> "That action in mandamus, however futile from a legal standpoint, does not come within the terms of the indictment charge.
>
> '* * * Where, however, it is necessary or where the pleader elects to set forth by averments in the indictment or information, a description of the instrument or the means by which the offense was consummated, then the evidence must correspond with the averments in general character and operation.' 1 Wharton's Criminal Evidence (10th Ed.), par. 91, p. 277."

In *Gammon v. United States* (C. C. A. 7), 12 Fed. (2d) 226, an indictment charging use of mails in execution of scheme to defraud by obtaining orders which would not be filled was held not supported by proof of soliciting orders knowing business to be insolvent, with the hope of being able to bolster it up.

See additional cases, *supra,* pages 60, 68.

(c) There Is No Evidence to Sustain the Allegation That the Defendants Did Depress and Cause to be Depressed the Market Price of the Securities of the First Security.

This allegation contains two elements: one, that the defendants "did depress and cause to be depressed the market price," and two, that "defendants might and did acquire the same * * * at prices greatly reduced." The Court, during the trial of the case, unequivocally

took the position that both of these elements must be proved under the indictment [R. 525, 527].

The Court, following the conclusion of the taking of testimony and during the course of his instructions, departed from this position and failed to give the instruction requested by the appellant in this regard. The Court instructed the jury that they were warranted in finding that the defendants "depressed and caused to be depressed the market price of the securities * * * as alleged in the indictment" if they found "that *a situation* was caused whereby the persons * * * intended to be defrauded were not able to get as high a price for their securities in the sale of them as they would have had it not been for the activities of the defendants."

Thus, the Court submitted this issue to the jury on the basis of bad business management and left it to the jury to speculate as to whether a higher price could have been obtained than was, in the absence of any proof as to market price or market value.

We have shown that the plaintiff made no attempt to prove either market price or market value of these securities; also, that where it was permitted to be elicited on cross-examination the security holder received not less than the market price in the sale of his securities (*supra*, pp. 36-37).

As we have seen, there were no false representations in inducing the exchange of the securities. Therefore, there remains only the issue of acquisition of securities at greatly reduced prices by false representations resulting in depressing the market price thereof. The fraud on this second branch of the case consists of buying the securities from investors under the market price. If they were

paid the market price, they have not been defrauded even though false representations were made to induce the sale.

It is important to note that the alleged false representation as to liquidation of the assets of the Railway Mutual was withdrawn by the above instruction of the Court from consideration by the jury in connection with this allegation that the defendants did depress the market price and acquired the securities at reduced prices. See our comment *supra,* page 6; also *Barnard v. U. S., supra,* page 61.

In *Mandelbaum v. Goodyear Tire and Rubber Co., et al.* (C. C. A. 8), 6 Fed. (2d) 818, 825, it was held that plaintiff in an action for fraud and deceit must prove that the property at the time of sale was worth less than the price paid, and how much less.

Affirming judgment for defendants, the Court said:

> "It is then incumbent upon him to prove that the property at the time of the sale was worth less than the price paid, and how much less. Sigafus v. Porter, 179 U. S. 116, 21 S. Ct. 34, 45, L. Ed. 113; Nupen v. Pearce, 235 F. 497, 149 C. C. A. 43; Richardson v. Lowe *et al.,* 149 F. 625, 79 C. C. A. 317."

It is a matter of common knowledge, as the decisions reflect, that during the period covered by the indictment the country generally was passing through a period of depression in which many economic forces operated to depress market value of securities generally and especially of real property securities. The fluctuations thus occasioned were entirely independent of the actual in-

trinsic value of the stock or securities. In *Mandelbaum v. Goodyear Tire & Rubber Co., supra,* 6 Fed. (2d) 818, 824, the Court said:

> "It is a matter of common knowledge that a period of depression, such as has been shown to exist, coupled with the necessity of refinancing and reorganizing, would of itself depress the price of any stock upon the market without regard to its actual intrinsic value * * *"

In *Gold v. United States* (C. C. A. 8), 36 Fed. (2d) 16, 33, it was held that in view of the abnormal business conditions it was improper to admit evidence of a drop in price of a certain bank stock between 1925 and 1927, for the purpose of showing the 1925 prices were fictitious. The Court said:

> "Evidence of various kinds was allowed to be introduced tending to show a drop in the price of the stock of the Southern Minnesota Bank from May, 1925, to the time of the trial in November, 1927; the purpose of the evidence being to establish that the prices in May and June, 1925, were fictitious and caused by the alleged fraudulent representations. The evidence was plainly inadmissible. Many factors might have intervened to affect the price unfavorably, and the uncontradicted evidence in the case showed the existence of a number of such unfavorable factors after the sales in May and June, 1925. The ruling in the Mandelbaum case on a similar point is controlling here."

In *Castle v. Acme Ice Cream Co.,* 101 Cal. App. 94, 101, the Court said:

> "There is no presumption that the face value of stock is its real value."

In *United States v. Schwartz* (D. C., Cal.), 230 Fed. 537, 538, a demurrer to an indictment was sustained for failure to show the real value of the lots which were being sold under the alleged fraudulent scheme.

The Court stated at page 538:

> "It is immaterial that a purchaser may not get a lot worth $150 for $19.50, although expecting to do so. If he does get a lot worth much more than $19.50 for that sum, he cannot be said to have been defrauded, and there is nothing in the indictment to negative this possibility."

To the same effect:

> *Miller v. United States* (C. C. A. 7), 174 Fed. 35, 38.

In passing upon the motion of defendant Twombly for a bill of particulars, the trial court followed the rule of the foregoing cases. In his instructions he told the jury that he had ruled that defendant Twombly was entitled to know "the *actual value* of the securities depressed, the amounts withheld * * * [R. 987].

No proof having been offered as to the actual value of such securities, or of any disparity between actual value and market value or even any evidence as to prevailing market price—and no suggestion of manipulating the market price downward—the trial court authorized the jury to conjecture whether a "situation was caused" whereby the sellers were not able to get "as high a price for their securities in the sale of them as they would have, had it not been for the activities of the defendants" [R. 1033]. (See Point V, *infra,* p. 83.)

The indictment presents the specific charge that defendants *depressed the market price.* There was a total absence of proof of any of the elements of this charge. There was no proof of market price, no proof of actual value and no proof of depressing the market price.

In substituting an entirely different issue and authorizing the jury to convict upon their own view of whether the defendants' activities generally were such that the sellers received less than they otherwise would, the Court bridged a defect in proof more serious than that condemned in any of the cases cited (*supra,* pp. 60, 68, 72).

(d) There Is No Evidence to Sustain the Allegation That Defendants Did Convert and Divert to Their Own Use, Benefit, and Profit Large Sums of Money and Property of the First Security, Under the Pretense of Loans; or for That Matter, by Any Other Means or Method.

There was no evidence that defendants converted and diverted to their own use, benefit, or profit, large sums of money or property of the First Security, or of the persons allegedly intended to be defrauded, under the pretense of loans, or otherwise.

It was conceded by the plaintiff that the defendants did not convert and divert personally to their own use any of the property or funds of the First Security. The plaintiff, however, did contend that the First Security loaned and advanced money to the Investment Finance Company and that the Investment Finance Company, in turn, loaned

moneys to two other corporations, namely, the Pierce Petroleum Corporation and the Pacific Brick Company, in which one or more of the defendants had a stock interest. We have seen that the only company in which the appellant Edgerton had a stock interest was that of the Pierce Petroleum, and this stock interest appears approximately two years after the Investment Finance loaned moneys to the Pierce Petroleum. In fact, none of the defendants had any interest in the Pierce Petroleum at the time the loans were made. It likewise appears that Mr. Twombly had a stock interest in this same company under like conditions as those of appellant Edgerton. The appellant Edgerton had no stock interest in any of the other companies to whom the Investment Finance loaned money (*supra,* pp. 28-32). As we have seen, only the defendants Starr and Thomas had a very casual minor stock interest in the Pacific Brick Company (*supra,* p. 30). There is no proof that they profited in the slightest from any moneys loaned to the Pacific Brick Company.

We have also seen that the First Security organized the Investment Finance and was the sole stockholder of that company, with the exception of qualifying shares in the board of directors, at a time when the Investment Finance Company initiated the making of loans and purchase of stocks in other corporations; also, that these loans and borrowing had reached their high point at the time the defendants became stockholders of the Investment Finance by the transfer of the assets of the R. F. D. to the Investment Finance (*supra,* pp. 26-28). Further, we

have seen that this line of investments and loans by the Investment Finance was established long before the appellant Edgerton became manager of the Investment Finance (*supra,* pp. 29-32).

The stock interest acquired by Mr. Edgerton in the Investment Finance amounted to $1,666.00. Most of the other defendants' stock interest amounted to $7,500.00.

The evidence also discloses that most of the other defendants were executive officers in the Railway Mutual, initiated the plan of reorganization, and officered the First Security, long before Mr. Edgerton became identified as the attorney of that company; and they continued in their respective official capacities after he became attorney.

All of these defendants, with the exception of the defendant Twombly, were either acquitted on all counts, acquitted on some, or a disagreement was had on the counts upon which they were not acquitted [Supplemental Record p. 1 *et seq.*]. Obviously, there were factors which worked powerfully against the appellant Edgerton, *e.g.,* collateral matters such as the Twombly statement, and rulings, acts and statement of the Court which deprived him of a fair trial.

POINT IV.

Assignments of Error II to XI, Inclusive.

These Assignments of Error Relate to the Insufficiency of the Evidence as to Each Count Upon Which the Appellant Edgerton Was Convicted and Challenge the Ruling of the Court in Denying His Motion Made at the Close of the Plaintiff's Case and Renewed at the Close of All the Testimony in the Case to Dismiss Said Counts.

Said assignments of error are identical with Assignment of Error I which is printed in full in the appendix hereto at page 5 and succeeding pages.

The motion referred to in the foregoing assignments and the ruling of the Court thereon appear in the Bill of Exceptions at pages 927, 944-946 of the record.

These counts are all identical with Count 1 of the indictment except for different indictment letters, and all charge the same substantive offense.

Assignments of Error I, III, V, VII, VIII and X relate to the Court's error in denying the motion to dismiss Counts 1, 4, 6, 8, 11 and 13 of the indictment; upon these counts, the Court imposed sentences of imprisonment, said sentences to run concurrently with each other. Assignments II, IV, VI, VII, IX and XI relate to Counts 2, 5, 7, 9, 12 and 14 of the indictment. On these counts, the Court placed the appellant on probation.

The arguments advanced in the preceding point and the succeeding point are applicable to these assignments of error and are adopted as the argument addressed to them.

POINT V.

Assignment of Error XV.

The District Court Erred in Refusing to Charge the Jury as Requested Concerning the Absence of Evidence to Prove Market Price or That the Market Price Had Been Depressed.

Assignment of Error XV is as follows:

> "Said District Court erred in refusing to charge the jury as requested in defendant's and appellant's Instruction No. 88,
>
> (Defendant J. Howard Edgerton's Requested Instruction No. 88)
>
> 'You are instructed that the indictment in this case charges that the defendants did depress and cause to be depressed the market price of the securities of the First Security Deposit Corporation. You are further instructed that there is no evidence in this case proving the market price, or prices, of the securities of First Security Deposit Corporation, and as a consequence thereof, the government has failed to prove that the defendants, or either of them, did depress or cause to be depressed the market price of said securities.'
>
> An exception was duly taken upon the conclusion of the instructions to the jury to the court's failure to give said instruction." [R. 1063-1064; Bill of Exceptions R. 1038, 1041.]

In lieu of the foregoing instruction, the trial court instructed the jury,—

> "If you find from the evidence that a situation was caused whereby the persons alleged in the indictment as those persons intended to be defrauded were

not able to get as high a price for their securities in the sale of them as they would have had it not been for the activities of the defendants, other than the defendant Twombly, then you are at liberty to find that the defendants depressed and caused to be depressed the market price of the securities of the First Security Deposit Corporation as alleged in the indictment." [R. 1033.]

As we have seen in Point III, *supra,* page 74, the allegation of the indictment was that defendants "did depress and cause to be depressed the market price of the said securities of First Security Deposit Corporation, so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value thereof . . ." [R. 8.]

The prosecution wholly failed to prove that the market price of the securities had been depressed as alleged, Point III, page 74, *supra.* Nor was there any proof of the market or intrinsic value of the securities or stock, or of any fluctuation therein.

This obvious defect in proof upon a material charge of the indictment was supplied by the trial court's action in rejecting the defendant's instruction and instructing as he did.

The Court authorized the jury to consider whether a "situation was caused," whereby the sellers received less than they would have received, "except for the activities" The fact that a "situation was caused," knowingly or unknowingly, or by reason of bad judgment or otherwise, which reacted unfavorably upon the resale price of the securities, made the defendants guilty of depressing the market price.

The phrase "a situation was caused" is itself so indefinite, vague and all-comprehensive as to constitute the jurors the judges of both the law and the facts, in effect it required the jury to exercise a "roving commission" to determine on its own opinion of the law and the facts whether the various transactions in evidence were calculated to react unfavorably on the price obtainable by the sellers.

Barrett v. So. Pac. Co., 207 Cal. 154, 165.

The general conduct of business in a manner resulting ultimately in lessening the sales price of stock, was made the criterion of criminal liability, rather than the specific charge of the indictment that defendants had depressed or caused to be depressed the market price of the securities. There is no particular instance of mismanagement or even bad judgment which the jury might not infer would react unfavorably upon the sales price of the securities under the Court's instruction. Even though appellant had not requested a proper instruction, the instruction that the Court did give is so patently erroneous as to invoke this Court's jurisdiction to consider the same as a plain error even in the absence of an exception thereto.

In the case of *United States v. Minuse,* C. C. A. 2, 114 Fed. (2d) 36, 39, *infra,* page 138, defendants were charged with manipulation of security prices in violation of the Securities Exchange Act. The proof showed considerable fluctuation in the market price, likewise a large number of "wash sales," also matching of purchases and sales and use of dummies to buy or sell stock. The judgment of conviction was reversed for insufficient proof of

intentionally manipulating the market price, the Court stating:

> "To convict defendants it was necessary to prove that they *intended* to manipulate the stock market."

So, in the present case, the fact that as a result of defendants' management of the affairs of the companies involved, the price obtainable for the securities may have been less than the price would have been, if defendants had taken a different course of action, is not sufficient to support a charge of depressing the market price. Defendants were not on trial for all business errors which might react on the securities' price. They could only be convicted under the charge, if it was shown not only that the market price was depressed, but that the defendants *intentionally* depressed it.

The Court's instruction withdrew the element of market price as such, or any fluctuation of the market price. It left for the consideration of the jury, only the question of whether in their opinion a higher price would have been obtainable except for defendants' activities.

The error of the Court in this regard was especially prejudicial in view of the entire failure of proof of market price or fluctuation in market price of the securities, *supra,* Point III, page 74, and in view of the trial court's rulings refusing to allow evidence as to the market price, on cross-examination of plaintiff's witnesses. *Infra,* Point XIV, page 151.

The prejudicial effect of the trial court's instruction is all the more glaring by reason of the fact that it constituted a complete reversal of the position consistently taken by the Court during the trial of the case.

Thus, Record pages 524-525, after counsel for defendant had stated that there was no evidence that the market had been depressed, and further

> ". . . the mere fact that the bonds had a face value of $100 and might have been bought for $40.00, itself does not tend to prove or disprove any of the issues set forth in that conjunctive allegation (referring to the charge in the indictment).
>
> The Court: That was the thing that I wanted to bring specifically out into the record because of the wording of this indictment and the wording of the question.
>
> It seems to me *there are two necessary phases of proof* in that paragraph in the indictment. . . .
>
> The first element, 'that the defendants would depress and cause to be depressed the market price of the said securities.' That is the first element.
>
> The second element is they did that 'so that defendants might and did acquire the same from the persons intended to be defrauded at prices greatly reduced from the par value.'
>
> Now, both elements have got to be proven."

Further, with reference to the first allegation, the Court stated:

> "The Court: That is an important allegation in the indictment, and proof will have to be coming in to connect those two together in order for the government to make its case, and then if they don't, you can move to strike."

Attention has already been called to the Court's ruling requiring the prosecution to show in a bill of particulars the *actual value* of the securities depressed (*supra,* p. 78).

POINT VI.

Assignment of Error XXIX.

The District Court Erred in Admitting in Evidence the Statement of Defendant Twombly, After His Disassociation From the Defendants, Exculpating Himself and Inculpating the Appellant Edgerton.

The assignment of error to which the discussion under this topic will be directed, relates to the admission in evidence of Plaintiff's Exhibit 216, over the objections and exceptions of the appellant, and in denying his motion to strike the same. This is a statement made by the defendant Twombly to a post office inspector some time after he disassociated himself from the defendants, and after he had left the employ of the First Security and Investment Finance. The statement is one which exculpates himself and inculpates the appellant Edgerton. It is a long accusatory statement against Mr. Edgerton, of which he had no information until it was offered at the trial.

Said assignment of error appears in full in the appendix hereto, at page 7, and succeeding pages.

The ruling to which said assignment relates, appears in the Bill of Exceptions at pages 791, 794, and 920 of the record.

The objections and proceedings to which such ruling relates, appears in the Bill of Exceptions at pages 753, 775-791, and 919 of the record.

Plaintiff's Exhibit 216 was a lengthy statement, undated, which plaintiff's witness Webster testified that Mr. Twombly had told him in July of 1940 he had prepared and handed to Inspector Van Meter in 1939 [R. 773-4]. There was no evidence as to the time when the statement

had been prepared, and no evidence whatever that the statement had been exhibited to anyone except Inspector Van Meter in 1939, and to Mr. Webster in July of 1940 [R. 751].

Mr. Twombly was General Manager of the First Security from 1934 to 1938 and of the Investment Finance Company from 1935 to 1938, when he severed his connection with the Company. The Court instructed the jury that Mr. Twombly "severed his connection with all of the corporations on December 21, 1938, and the plaintiff doesn't claim that he is chargeable with any criminal action that happened subsequent to that date." [R. 1027, 981.]

Without further identification as to date or circumstance under which the statement was made, the Court permitted the statement to be read in evidence to the jury as the Court stated in his formal instructions to the jury, "for the purpose of showing what was the mental state, what was going on in the minds of the parties who were involved." [R. 1031.] (The Court in his final instructions required the jury to consider this statement for additional purposes, *infra,* p. 97.)

The Court recognized the necessary prejudicial effect of this evidence upon the other defendants involved, and stated [R. 785-6]:

> "The Court: Now, on this question of intent, if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall, * * * in getting at the intent, when he was connected with these companies * * * Does it make a particle of difference whether he got it from the books, whether he got it from

Kenner, whether he got it from Mr. Edgerton, or whether he didn't get it from anybody, whether he had a dream and he got it out of a dream. Is it not admissible to show what he thought, whether it was true or false?" [R. 785-6.]

Defendant Edgerton objected to the reception of said evidence, and thereafter moved to strike the same upon the grounds that no sufficient foundation was shown, that the statement was hearsay, immaterial, was made after the termination of Twombly's connection with the defendants and after the termination of the alleged conspiracy, that it was not binding upon defendant Edgerton or within the issues of the case; that it was a recital of conclusions and a narration of past events not material or competent for any purpose, and of such a prejudicial character that its reception in evidence could not be cured by any limitations which the Court might assume to place thereon; that its effect was to impose the burden of proof upon defendant Edgerton to prove his innocence [R 753, 775-791, 919].

THE ACCUSATORY STATEMENTS EMBODIED IN THE TWOMBLY STATEMENT WERE HIGHLY PREJUDICIAL TO APPELLANT EDGERTON.

It is well to note that Post Office Inspector Webster started the government's investigation after receiving the statement that Twombly had prepared and handed to Inspector Van Meter [R. 751, 774]. The statement was obviously prepared as an indictment of appellant Edgerton, and it refers to no fact or circumstance, except such as is calculated to reflect unfavorably upon this appellant. It accuses appellant of being responsible for everything in the way of loss, damage, misman-

agement, poor investments, or bad business judgment occurring over a period of more than four years. These charges are not confined to the charges contained in the indictment, but cover every act or transaction which in the mind of the declarant was calculated to discredit appellant Edgerton.

The following statements and outline constitute the entire substance of the exhibit:–

(1) That "high pressure salesmen" were sent out to contact the security holders and that these holders were "apparently promised and told anything and everything in order to obtain their consents" to the plan of reorganization. [R 755]

(2) No plan of exchange of securities was "consistently" followed. [R 755]

(3) The so-called plan was "so long and so complicated that it was apparently understood by nobody." [R 755]

(4) "Lobbyists were then put to work to procure the passing of enabling legislation" to make possible the reorganization. [R 756]

(5) "At this time J. Howard Edgerton, an attorney was added" to the "controlling directorate." [R 756]

(6) "To put the deal over a deal was made with Charles E. Kenner, a graduate of Sing Sing Prison for the misuse of other peoples' money and now in Folsom penitentiary for the same reason." [R 756]

(7) "The transactions and all motions clearly show that any realization or acceptance of fiduciary relationship, between these dominating personages and these they purported to represent, was entirely lacking. Such a condition has continued throughout. Not only this, but the

history of this set-up reflects that every strong personality connected with these companies who attempted to work for the interests of the investors was ousted." [R 756]

(8) That about 80 per cent of the investors were "high pressured into the First Security * * *." [R 757]

(9 That there was "no notice of any stockholder's meeting"—except in the Los Angeles Daily Journal—"which is not read by the public at large." [R 758]

(10) That "Mr. Edgerton formed the R. F. D. Discount Company—" [R 759]

(11) That Battelle-Dwyer Company was to have the exclusive right to buy securities of the First Security Deposit Corporation and were to be paid a premium of five points. [R 759]

(12) That "Any sort of story or procedure was used to jockey the investors in the First Security Deposit Corporation out of their securities. The original price paid was in the neighborhood of 20 cents on the dollar for the bonds, and much stock was secured free on the representation that it was without value." [R 760]

(13) That a deal for the exchange of a house on Stern Drive to Edgerton for bonds was handled through an escrow on which Edgerton borrowed approximately $2300.00 on the same house from a third party to pay for the bonds and the costs of escrow. [R 760]

(14) That Edgerton sold this house later "for about $4500.00 cash." [R 761]

(15) That Edgerton also bought another piece of property in Santa Monica. [R 761]

(16) That Edgerton bought bonds of the First Security "of a face value of $11,750.00. The price paid was be-

tween 30 and 40 cents on the dollar." That these bonds were exchanged for the Santa Monica property. "This resulted in a book loss on the property of $372.72. The actual cash loss to investors of the First Security Deposit Corporation on these two deals is about $7,000.00." [R 761]

(17) That Battelle-Dwyer Company overcharged $1.00 per share on a thousand shares of First Security Deposit Corporation preferred stock which stock was delivered to Edgerton and Starr for the R. F. D. Discount Company, but the amount was later refunded to First Security Deposit Corporation. [R 761]

(18) That R. F. D. Discount Company had "voting control" of First Security Deposit Corporation. [R 762]

(19) That the stock would become very valuable "if the bondholders could be chased out of the picture cheaply enough." [R 762]

(20) That Kenner, in order to use the Railway Mutual "in some of his manipulations * * * approached Edgerton" * * * and it was arranged that R. F. D. Discount Company would trade the same par value of First Security Deposit Corporation stock to First Security for $19,000 face value of securities which it owned in the Railway Mutual. That at the time all holders of First Security "were being assured by Battelle-Dwyer Company that it was worthless." [R 762]

(21) That P. S. Noon, needing money in mining operations "approached Edgerton and it looked like a very lucrative deal to him." He and four or five others made a deal (involving bonus, etc.) with Noon to procure the money. That $15,000 worth of Railway Mutual securities were borrowed from the R. F. D. Discount Company

and Edgerton hypothecated the Railway securities to a third party for the money loaned to Noon. That the mining deal failed. [R 763]

(22) That Edgerton formed the State Investors Corporation, consisting of his father and a former employee of the First Security Deposit. That it was "entirely devoid of any financial backing," yet a contract with First Security was entered into whereby First Security Deposit would sell $187,000.00 book value of designated real property to State Investors. That this purchaser took immediate possession of the properties and rents without obligation to make any payment other than taxes for one year. That it could pay for any individual piece of property by delivering face value of First Security Deposit Corporation bonds for book value of the property or could pay in cash at the rate of 40 cents for each dollar of book value. That this arrangement was "so entirely bad and unsatisfactory" to the First Security Deposit that it was "cancelled by mutual consent after about six months." [R 763-4]

(23) That Investment Finance Company, "organized and operated in conjunction" with First Security, "has engaged in many activities most of which have resulted in frozen assets." That the Kenner deal which resulted in a loss of about $25,000.00 "was consummated by Edgerton. Deals with Kenner have cost about $75,000.00." [R 765-766]

(24) That one director stated that the writing of certain letters with regard to the First Security being in liquidation "was contrary to the Federal Securities Act, and also was possibly using the mails to defraud. * * * Edgerton finally decided that no letters should be written out of the State of California." [R 767]

(25) That "Edgerton became interested in the Western Brick Company and caused Investment Finance Company to invest about $30,000 therein * * * he * * * acquired some free stock * * * in the transaction." That there was a "freezing out of minority stockholders in the Western Brick Company" and that that Company "has operated at a loss since acquisition." [R 767]

(26) That Edgerton "* * * presented a deal" whereby stock of a Santa Monica bank, which had assets equivalent to about $71.00 per share, was bought by Investment Finance Company at the rate of $150.00 per share and a loan was made to Battelle-Dwyer Company on 167 additional shares at the rate of $150.00 per share. That Edgerton and Dwyer were voting trustees holding stock control of the bank. That Battelle-Dwyer Company failed to pay its loan and the Investment Finance acquired their bank stock. [R 767-768]

(27) After referring to alleged bad investments in two other companies, the statement continues "none of these ventures has made any profits and the possibilities of ever making any are exceedingly remote.

This frenzied finance and extreme mismanagement results in a loss to the investors in First Security Deposit Corporation between $300,000.00-$400,000.00." [R. 769-770]

(28) That "Edgerton is attorney for all of these companies and actually runs them." [R 770]

(29) That in order to qualify as a director of the American National Bank, Edgerton entered into "a subterfuge to get around the requirements of the government" by giving a promissory note for certain stock without any intent to pay therefor. Edgerton's stock being held in the

office of the Investment Finance Company, was assigned in blank. [R 770-1]

The foregoing charges run the whole gamut of corporate mismanagement, abuse of trust, deception and outright dishonesty, corruption and fraud. Obviously the matters related in this statement were highly inflammatory. The document itself consisted almost entirely of statements of the declarant's opinion of the character and conduct of this appellant, wholly derogatory in nature, and stated in such graphic fashion that their insiduous effect upon the jury, could not be removed by any formal limitation of purpose of the evidence. Furthermore, there is not the slightest basis for the contention that any of these charges contained a single statement of any relevant or material evidentiary matter.

The charges covered a subject matter far beyond the scope of the indictment.

None of the charges above summarized and contained in the statement, is supported by any substantive evidence.

The Accusatory Statements of the Defendant Twombly Were Inadmissible as Hearsay.

The trial court admitted the accusatory statements in their entirety upon the theory that they were proper to be considered in determining the intent of the parties, and instructed the jury that they were to consider the statements for the purpose of showing what was "the mental state, what was going on in the minds of the parties" and "in relation to the intent, if any, that Twombly may have had with reference to his participation in the alleged scheme and artifice to defraud prior to December 21, 1938, when he severed his connection." [R. 1031.]

The Court also instructed the jury that "there is no evidence before you as to when, after the defendant Twombly separated from said companies, he wrote said statement, except as I have just stated." [R. 1031.]

The testimony referred to was that of plaintiff's witness Webster, that he had interviewed Twombly about the statement on July 9, 1940, and was told by him that it was the statement that he had given to Inspector Van Meter [R. 751, 774].

The Court further instructed the jury that—

> "As a matter of law it is to be presumed that the statement was made upon the last day that he was connected with said companies, to-wit, December 21, 1938 * * *." [R. 1032.]

Thus the Court told the jury as a matter of law a statement whose only identifying date was July, 1940 (when it was identified by Twombly in his conversation with plaintiff's witness Webster), must be presumed to have been prepared prior to the disassociation of Twombly, despite an entire absence of evidence in this regard.

In ruling in this manner, the Court has not only endeavored to supply the entire absence of foundation, but has instructed the jury affirmatively that the pre-existence of the document is to be assumed as a matter of law. The burden is upon a party offering testimony to show that it meets the requirements of the rules of evidence. To avoid the hearsay rule the party must bring himself within the terms of some exception. This he can do only by an affirmative showing in this regard of the circumstances invoking such exception. The case of the prosecution fails utterly to show any of the circumstances surrounding the execution of the Twombly statement and

fails utterly to comply with any of the tests of the hearsay rule. The receipt of the statement in evidence to show mental condition, or intent, can only be justified where it affirmatively appears that the statement is one of a present existing state of mind, *i.e.,* contemporary with the act under inquiry.

> "* * * the judicial doctrine has been that there is a fair necessity, for lack of other better evidence, for resorting to a person's own *contemporary statement of his mental or physical condition.*" (Emphasis by the author.)
>
> *VI Wigmore, Evidence,* Sec. 1714, p. 58.

> "The only limitation as to the use of such statements (assuming the fact of the design to be relevant) are those suggested by the general principle of this exception (*ante,* Sec. 1714), namely, the statements must be of a *present existing state of mind,* and must appear to have been made in a natural manner and not under circumstances of suspicion." (Emphasis by the author.)
>
> *VI Wigmore, Evidence,* Sec. 1725, p. 80.

The "circumstances of suspicion" referred to by the author, as indicated by the quotations in the footnote, include any "suspicion of an intention to make evidence to be used at the trial."

In *Wigmore, Evidence,* Third Ed., Sec. 1729, p. 90, it is pointed out that a declaration is not admissible to show mental condition unless it attends an act otherwise ambiguous and is made *at the time of the act.*

The author states:

> "Moreover, when it is relevant and therefore provable, it is commonly so only when attending an act

otherwise ambiguous and equivocal" (p. 90) * * * "Moreover, since the person's intent at the time of the equivocal act is alone material, his declarations of intent made at a former or subsequent time are declarations of an immaterial fact. His subsequent declarations of a past intent are, furthermore, of course not admissible under the present exception; * * *"

And at page 197 (Sec. 1776) under the caption

"Words must accompany the conduct in time," the author states: "Since the words are used only as verbal parts of the whole act, filling out and giving legal significance to the conduct, it is obvious that the words must be *contemporaneous with the conduct,* or, in the usual phrase, must accompany the act." (Emphasis by the author.)

The same rule is laid down in *Eppinger v. Scott,* 112 Cal. 369, 374; *Adkins v. Brett,* 184 Cal. 252, 255; *Fidelity & Cas. Co. v. Haines* (C. C. A. 8), 111 Fed. 339-340.

In 20 *Am. Jur.,* Sec. 585, page 491, the same rule is stated:

"Assuming that the state of mind of a person at a particular time is relevant, his declarations *made at that time* are admissible as proof on that issue, notwithstanding they were not made in the presence of the adverse party."

Continuing the text points out, pages 492-3:

"On the other hand the declarations of one party are not admissible to prove what was in the mind of the other party when making a statement."

In *Lane v. United States* (C. C. A. 8), 34 Fed. (2d) 413, 415, the Court said, with respect to testimony that one of the parties to the scheme to defraud (who was not on trial) had said that the scheme had worked in a number of places and that he had served jail terms for operations of the same kind:

> "The admission of this testimony seems to be violative of the most elementary rules of evidence. The testimony elicited was palpably hearsay, unless it was admissible on the theory that it constituted the declaration of a co-conspirator. It was not made in the presence of the defendants on trial; it constitutes no part of the *res gestae,* and, if it be conceded that a conspiracy between Cushman and the defendants had been established, certainly there was nothing to show that these statements by Cushman were made during the existence of any such conspiracy. They apparently constituted a narrative of past events by which the declarant sought to exculpate himself and inculpate his codefendants, and they were not made in furtherance of the conspiracy or common design."

Obviously, even if the Twombly statement had been made, as the Court erroneously instructed the jury, on December 21, 1938, it would be wholly irrelevant and incompetent, as that is the day on which he, according to the Court's instruction to the jury, severed his connection with the various companies. Furthermore, there is no act of his alleged or proved to have occurred on December 21, 1938, the intent of which this statement could evidence; and even if it had been made on that date, it could not evidence the intent of any prior act or conduct of that defendant.

But as we have said, there can be no presumption that the statement existed prior to its actual exhibition to plaintiff's witness, and in view of the prosecution's failure to make a definite showing in this regard, the presumption is directly contrary to that declared by the Court, and is and must be that the statement had no existence prior to the date of such actual exhibition, *i. e.,* more than a year and a half subsequent to December 21, 1938.

The Court's error in this regard was accentuated by an instruction which required the jury "to determine whether or not the defendant Twombly believed the said statements were true or false when made," and also, "to decide whether or not the information thus received if it was in truth and in fact received prior to his disassociating himself from said defendants and said companies" (the Court had already instructed the jury that such was a presumption of law), "and thus construed by said defendant Twombly, may or may not have been the cause of his disassociating himself on said December 21, 1938, with said defendants and with said companies" [R. 1032].

The Court thus inexplicably placed in issue before the jury, the truth or falsity of these entirely collateral charges and gave them substantive force in themselves as matters to be considered by the jury as actuating Twombly in disassociating himself from defendants. With the emphasis thus placed by the Court upon the accusatory statements of this witness, it was inevitable that no mere instruction to limit the effect of the evidence could operate to eradicate from the minds of the jury the impression necessarily conveyed by such statements. The Court thus extends the scope and effect of this evidence beyond its original purported limited purpose and permits

it to stand as substantive evidence in the case to determine whether it actuated Twombly's resignation, and not as evidence limited merely to the question of the declarant's state of mind.

This Court had before it a somewhat similar situation in *St. Clair v. United States* (C. C. A. 9), 23 Fed. (2d) 76, 78, where the trial court permitted the government to introduce accusatory letters from the Secretary of the State of Washington to the company and its fiscal agent. The letters, together with the replies, were offered "to show knowledge"—just as in the present case, the Twombly statement was offered to show "intent" (and the Campbell report to show "knowledge," *infra,* p. 119).

This Court said in reversing a judgment of conviction:

> "The purpose for which this correspondence was offered is not made entirely clear. When the offer was made, the court inquired, 'Are there any admissions?' meaning, of course, any admissions on the part of the defendants. To this inquiry, counsel for the government replied, vaguely and somewhat irrelevantly, 'To show knowledge, if the court please.' The court thereupon admitted the correspondence in evidence, instructing the jury that they could only consider the letters of the secretary of state for the purpose of enabling them to understand the responses thereto by the defendants, and that they should not consider as true, as against the defendants, any statements contained in the letters written by the secretary of state. To the ruling of the court, an exception was allowed. Of course, if the letters written by the defendants to the secretary of state contained admissions against interest, they were en-

tirely competent, and if the letters could not be properly understood, except in connection with the letters written by the secretary of state, the latter were also competent within the limits specified by the court.

The government does not claim, however, that the letters written by the defendants contained anything material to the case. Indeed, the letters were all self-serving and should have been ruled out as incompetent if offered by the defendants in their own behalf. Furthermore, the letters written to the secretary of state could be readily understood without any reference to the letters from the latter. In other words, we can see no possible motive for offering this correspondence, except to get before the jury the incompetent, prejudicial statements contained in letters written by a state officer, condemning the enterprise in which the defendants were engaged as a swindle."

In *Hart v. United States* (C. C. A. 2), 240 Fed. 911, 917, an attorney for one of the companies having dealings with defendants, wrote a letter to defendant Hart accusing him of a considerable number of crimes and falsehoods. It was shown that this letter, and the accuracy of the statements therein had been discussed by Hart and the attorney. As to the ruling admitting the letter in evidence as to the statement made to defendant, the Court said:

"The reason is a novelty, and the action amounted to permitting a reputable member of the bar, a man of vigorous personality, substantially to make a speech, stating his very low opinion of one or more of the defendants. There is no pretense that what was said in the letter could have been repeated *viva*

voce by the witness to the jury; yet such was its practical effect when read to the jury, the writer sitting by in the witness chair. This was grave error."

If there are any portions of the 17 page document which are properly admissible, and we submit there are none, only such portions, if any, of the document as are properly admissible, should have been received in evidence.

In *Sartain v. United States* (C. C. A. 5), 16 Fed. (2d) 704, 706-707, the Government, for the declared purpose of proving one Baughn was not paroled for the purpose of testifying before the grand jury as had been intimated, introduced in evidence a resolution of the grand jury. The Court said:

> "The resolution was clearly inadmissible, for it had no tendency to contradict, but, on the other hand, corroborated, the circumstances admitted on cross-examination in regard to the granting of the parole. If it had been admissible for that limited purpose it *was wholly unnecessary to put before the trial jury the whole resolution.* Only such portions of a document as are admissible should be offered or received in evidence. *Those portions which might create prejudice against the defendant should be excluded.* Bates v. Preble, 151 U. S. 149, 14 S. Ct. 277, 38 L. Ed. 106; Boykin v. United States (C. C. A.), 11 F. (2d) 484; Berry v. United States (C. C. A.), 15 F. (2d) 634 (present term). The recital that Baughn's reputation was good was nothing but hearsay, pure and simple, and, of course, should have been excluded." (Emphasis supplied.)

THE ATTEMPTED LIMITATION OF THE EVIDENCE WAS INEFFECTIVE TO ASSURE A FAIR TRIAL.

The Court in emphasizing that the accusatory statements were evidence of a state of mind of the defendant Twombly and were to be considered in relation to the question of whether or not he believed they were true, and whether or not they actuated him in disassociating himself from defendants, gave a far wider scope to this evidence than can be justified under any of the decisions.

But, if the Court had placed a proper and concise limitation upon the consideration of the evidence, its character is such that under no possible view can it be assumed that the jury would not be consciously or unconsciously influenced by the accusations made. As the Supreme Court has stated in a recent case, "The reverberating clang of those accusatory words would drown all weaker sounds."

In *Shepard v. United States,* 290 U. S. 96, 78 L. Ed. 196, declarations of a victim of an alleged homicide to the effect that she had a suspicion that she had been poisoned by her husband were admitted. The prosecution contended that they were admissible as negativing the theory of suicide and defendant's evidence as to her declarations of weariness with life. There was no limitation upon the evidence, but the Supreme Court held no limitation would have been effective, saying:

> "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of

those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. Thayer, Preliminary Treatise on Ev. 266, 516; Wigmore, Ev. 1421, 1422, 1714.

These precepts of caution are a guide to judgment here. There are times when a state of mind, if relevant, may be proved by contemporaneous declarations of feeling or intent. (Citing cases.) Thus, in proceedings for the probate of a will, where the issue is undue influence, the declarations of a testator are competent to prove his feelings for his relatives, but are incompetent as evidence of his conduct or of theirs. * * * So also in suits upon insurance policies, declarations by an insured that he intends to go upon a journey with another, may be evidence of a state of mind lending probability to the conclusion that the purpose was fulfilled. Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 S. Ct. 909, *supra*. The ruling in that case marks the high water line beyond which courts have been unwilling to go. It has developed a substantial body of criticism and commentary. Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, *pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.*

The testimony now questioned faced backward and not forward. This at least it did in its most obvious

> *implications. What is even more important, it spoke to a past act,* AND MORE THAN THAT, TO AN ACT BY SOME ONE NOT THE SPEAKER. Other tendency, if it had any, was a filament too fine to be disentangled by a jury." (Emphasis supplied.)

In the recent case of *Anderson v. United States,* 87 L. Ed. Advance Sheets 589, 592, 593, the Supreme Court held that the improper admission of evidence against *some* of the defendants in a criminal case requires a reversal as to all defendants.

> "There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others."

In *Whealton v. United States* (C. C. A. 3), 113 Fed. (2d) 710, 715, two statements dictated and signed by defendant Coffin were admitted in evidence "as to Coffin alone." As to the first statement containing the following: "I do not condone any of the offenses nor by the same token do I excuse what may appear to be compounding a felony," the Court said:

> "In no permissible view, was the exhibit competent as evidence against anyone. It contained no facts relevant or material to the establishment of the crime charged. It merely implied a legal conclusion of Coffin without reciting the facts whereon the conclusion was based. At best, it was no more than an opinion and therefore incompetent as a matter of evidence."

After pointing out that the possibility of harm from the improper admission of this statement was substantial, as to all defendants, and that the statement could not be considered as having been made in furtherance of the scheme to defraud, the Court said:

> "While the limitation of the admission of the exhibit as to Coffin fixed the extent of its legal purview with respect to the several defendants, it is impossible to believe that its effect could be so discriminatingly limited in the minds of the jury. The really practical effect of the improperly admitted exhibit was to predispose the jury to belief in the defendants' guilt because of Coffin's implied opinion that 'offenses' had been committed. It was the jury's duty to draw the conclusion of the defendants' guilt or innocence from the competent, relevant and material testimony in the case and not from unsupported opinions of anyone. The failure to exclude Exhibit G-8 rendered the jury's proper discharge of its duty improbable.
>
> What we have herein said with respect to the impropriety of Exhibit G-8 as evidence against any of the defendants applies equally to Exhibit G-313, a further statement dictated by Coffin, in which he said that it was his duty 'to go to the criminal authorities and report the facts, so that the officers and directors of the corporation could be prosecuted.' As before, this exhibit was admitted in evidence, over objection, only as to Coffin. The court cautioned the jury that opinions expressed by Coffin in the statement with respect to the guilt of other defendants was not evidence against them. But, the harm was done by the admission of the incompetent evidence and no amount of caution could take the sting of its implications from the minds of the jury. This statement spoke

of 'facts' but recited none. It likewise represented no more than Coffin's opinion and was not competent as evidence against anyone including himself."

In *Holt v. U. S.* (C. C. C. 10), 94 Fed. (2d) 90, 93-94, the indictment charged a scheme to defraud by representing an imposter to be an heir to valuable oil property. The Court admitted the imposter's purported dying declaration giving a complete narrative of what had occurred between the imposter and his alleged co-conspirators.

At the close of the case the Court withdrew the statement and instructed the jury to disregard it.

In reversing the judgment the Court said:

"Clearly the admission of the statement was prejudicial error.

It is the general rule that error in the admission of evidence is cured by withdrawing the evidence from the consideration of the jury and instructing the jury to disregard it.

However, where the character of the evidence is such that it is likely to create so strong an impression on the minds of the jurors to the prejudice of the defendant, that they will be unable to cast it aside in the consideration of the case, a mistrial should be ordered.

The statement purported to be a dying declaration. It was a full and complete narrative of what occurred between Alexander and his alleged co-conspirators from the beginning. It was before the jury from early in the trial until the close of the evidence. It must have made a deep and lasting impression on the minds of the jurors. It squarely contradicted Holt's defense that he did not know Alexander was

an imposter, while the competent evidence on that issue was far from conclusive.

We doubt that it was possible for the jury to efface the statement from their minds and to consider the case solely on the competent evidence adduced. In fact, we find it difficult so to do.

We are of the opinion that the instruction of the court to the jury to disregard the statement did not cure the error in its admission, and that the motion for a mistrial should have been granted. (Citing cases.)"

In *Lockhart v. U. S.* (C. C. A. 9), 35 Fed. (2d) 905, 906, this Court held that the action of the trial court in granting a motion to suppress all testimony based upon an illegal search of premises and in instructing the jury to disregard it, could not have eradicated the injurious effects of the evidence, saying:

"The question for decision therefore is this, May a court admit incompetent, prejudicial testimony before a jury and cure the error by withdrawing the testimony from the consideration of the jury at the close of the trial? That this may be done as a general rule is well settled; but there is an exception to the general rule as well established as the rule itself. . . .

This case falls within the exception and not within the general rule. As already stated, the testimony wrongly admitted was highly prejudicial in its nature, and its effect could not be entirely eradicated from the minds of the jury by a simple instruction to disregard it. It certainly cannot be said that such testimony would not unconsciously affect the verdict, however much the jury might be disposed to follow the instructions of the court."

As stated in *Adkins v. Brett,* 184 Cal. 252, 258-9, 260, 261-2:

> "If the point to prove which the evidence is competent can just as well be proven by other evidence, or if the evidence is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points. . . . This would emphatically be true where there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent."

The prejudicial character of the Court's ruling admitting in evidence the unsworn embittered accusations of the accomplice and co-indictee Twombly is clear from the foregoing summary.

In this situation the remark of the Court in *People v. Westcott,* 86 Cal. App. 298, 318, is peculiarly apt:

> "Is it possible that any jury, after hearing such evidence, in such a case, can erase it from their minds and not be influenced by the accusatory declaration, merely because the court tells them to consider the evidence only in passing on the credibility of a witness? . . ."

In *People v. McKelvey,* 85 Cal. App. 769, 771, the Court held that the fact that the trial court had ordered the objectionable evidence as to bad character stricken from the record and had instructed the jury to disregard the testimony as though they had never heard it, did not insure a fair trial.

The Court said:

> "It was an intellectual impossibility for the jury to wholly erase such testimony from their memory and to disregard it as though they had never heard it."

The prejudicial effect of this unsworn series of charges was increased, if such were possible, by the trial court's reception in evidence of the fact that various collateral transactions referred to in the charges were in fact entered into. Such substantive evidence could not fail to lend a cloak of truth to the charges relating to such transactions. (Point XV, *infra,* p. 158.)

POINT VII.

Assignment of Error XXX.

The District Court Erred in Denying Motion of Appellant Edgerton for a Severance Made at the Time of the Offer of Plaintiff's Exhibit 216 in Evidence and Renewed at the Conclusion of All of the Evidence in the Case.

Assignment XXX is as follows:

> "Said District Court erred in denying the motion of defendant Edgerton for a severance made at the time of the offer of Plaintiff's Exhibit 216 in evidence and upon the conclusion of all of the evidence in the case." [R. 1173.]

All of the grounds of said error in denying said motion were set forth in full in Assignment of Error XXIX and this assignment incorporates the same by reference. Said Assignment XXIX is set forth in full in the appendix hereto at page 7.

The motion for severance referred to in the foregoing assignment and the ruling of the Court thereon appear in the Bill of Exceptions at pages 775 to 788 of the record.

The prejudicial nature of the Twombly accusatory statement has been shown in our discussion of the preceding Point VI (*supra,* p. 91), and the same authorities which establish the inadmissibility of said accusatory statement as against this appellant would require that his motion for severance be granted, where as in this case the prosecution elects to use the accusatory statement.

Appellant's counsel were not only unaware of the existence of the Twombly accusatory statement, but had been affirmatively assured by the defendant Twombly and his counsel that no such statement was in existence. [R. 775-786.] The grounds asserted in support of the motion for severance clearly show that the appellant Edgerton was taken by surprise, that the statement implicated Edgerton and by its exculpation of Twombly and inculpation of Edgerton showed the additional basic ground of antagonistic defenses.

Where, as in this case, the prosecution relies upon the statement of one defendant, the admissions of which would necessarily be prejudicial to the other, the rule is clear that either the statement must be withheld from evidence or a motion for severance must be granted.

The Supreme Court said in the case of *Shepard v. U. S., supra,* 290 U. S. 96, 78 Law. Ed. 196:

> "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

The complete divergence between the principle announced by the Supreme Court and the theory of the trial

court herein is demonstrated by the trial court's statement in denying the motion for severance:

> "The Court: * * * Now, on this question of intent, if it is introduced for that purpose, is it not proper to introduce the whole document, regardless of where the chips may fall? * * *." [R. 785.]

In *Hale v. United States* (C. C. A. 8), 25 Fed. (2d) 430, 438-439, a reversal was ordered for failure of the trial court to order a separate trial of the abettor where the government relied upon a confession of the principal.

The Court said, after pointing out that the confession of Ramsey, the principal was incompetent to bind Hale, the alleged abettor:

> "The court so stated when it was admitted, and again in its charge; but it is inconceivable that the impression made upon the minds of the jurors could have been removed by these formal remarks of the court. Plaintiff in error is indicted as an abettor of Ramsey. Under ordinary circumstances, a joint trial would be proper procedure. * * *
>
> "The balance of the statement or confession would not be binding upon Hale, and if admitted would leave upon the minds of the jurors a lasting impression to his prejudice. The unavoidable mischief of a joint trial is thus made clear. The entire confession, if admissible and voluntary, as has been stated, would be competent as to Ramsey. Its admission in its entirety would be necessarily prejudicial to Hale, as we have indicated; but, on the other hand, the exclusion of the part involving Hale would place the government at a serious disadvantage in its prosecution of Ramsey, because, among other things,

the motive for the crime would be absent from the confession. It seems to us that these considerations are decisive against a joint trial."

In *Peo. v. Buckminister* (Ill.), 274 Ill. 435 (113 N. E. 713), it was held that on a trial of two defendants jointly charged with arson it was error to admit for impeachment purposes, the involuntary confession of one defendant although the jury were instructed to disregard the confession as affecting such codefendant.

"Even if it be assumed that the confession could be admitted against Fink for the purpose of impeaching him if he were being tried alone, we do not think that part of his confession which affected Buckminister, in view of the record before us, should have been admitted for any purpose when Buckminister was on trial jointly with Fink. . . . To obviate the evils arising from the possibility of the jury being misled by such confessions against the codefendant the rule is general that, where one of several defendants jointly indicted has made admissions or confessions implicating others, a severance should be ordered unless the attorney for the state declares that such admissions or confessions will not be offered in evidence on the trial. . . . It is very clear from all the authorities that the courts have realized the evils of admitting confessions on behalf of one defendant that implicated a codefendant, even though limited by the trial court to the person who made the confession, and have only permitted such a confession to be admitted, when two were being tried jointly, because there

> seemed no practical way of reaching a right result, under the law, as to the person who made the confession, without admitting it; that the injury as to the codefendant might be less than the evil that would arise in the enforcement of the criminal law if the confession were shut out entirely."

As to the prejudicial effect of the evidence the Court held that notwithstanding the instruction limiting the effect to a particular defendant, if there were any doubt as to defendant's guilt, the jury would find it difficult or impossible to remove from their minds the impression produced by the confession, which naturally would warp and prejudice their minds.

In *People v. Sweetin,* 325 Ill. 245, 156 N. E. 354, 357, the Court held it was an abuse of discretion to deny a separate trial where the confession of a codefendant was relied on, the Court saying:

> "While the court instructed the jury that Hight's confessions were not admissible as against plaintiff in error, such instruction could by no possibility eradicate the testimony from the minds of the jury. While theoretically the instruction withdrew the evidence from the consideration of the jury, practically the human mind is so constructed that inevitably the prejudicial effect remained therein . . . To obviate the evils arising from the possibility of the jury being misled by the confessions of a codefendant, the rule is general that, where one of several defendants jointly indicted has made admissions or con-

fessions implicating others, a severance should be ordered, unless the attorney for the State declares that such admissions or confessions will not be offered in evidence on the trial."

In *Randazzo v. U. S.* (C. C. A. 8), 300 Fed. 794, the Court held that no error was committed in the particular case by reason of the fact that the confessions admitted against the codefendant Randazzo did *not* implicate defendant Evola. The Court, however, did state that the situation would be different if the confession had implicated Evola. The Court said:

"It is contended that there was error, as against defendant Evola, in the admission of certain evidence which tended to prove the guilt of Randazzo, but which had no reference to said Evola, and neither tended to prove his guilt or demonstrate his innocence . . . The cases cited by counsel for defendant Evola are cases wherein the confession of one defendant, jointly tried with another, were admitted against such other, though containing evidence of the guilt of the defendant, who had no part in the confession. Of course, many cases hold that this would be error but that is not the situation here . . . As forecast, the situation might have been different, had the alleged confessions of Randazzo, made after the commission of the crime, connected Evola with the commission thereof."

POINT VIII.

Assignment of Error XXXI.

The District Court Erred in Denying the Motion of the Appellant Edgerton for a Mistrial Because of the Introduction and Receipt in Evidence of Plaintiff's Exhibit 216.

Assignment XXXI is as follows:

> "Said District Court erred in denying the motion of the defendant Edgerton that the Court withdraw a juror and thereupon declare a mistrial because of the introduction and receipt in evidence of plaintiff's Exhibit 216." [R. 1173.]

Said assignment then recites and by reference it adopts as grounds for said motion all of grounds set forth in Assignment XXIX, which said assignment is printed in full in the appendix hereto at pages 7 to 34.

The motion referred to in the foregoing assignment and the ruling of the Court thereon, appear in the Bill of Exceptions at page 788 of the record.

The arguments addressed to points VI and VII are adopted as the Argument addressed to this Assignment of Error.

See especially the cases *supra,* pages 98, 104, 109.

POINT IX.

Assignment of Error XXV.

The District Court Erred in Admitting in Evidence Plaintiff's Exhibit 46 Over the Objections and Exceptions of the Appellant and in Denying the Motion to Exclude the Portion Thereof Containing Hearsay Ex Parte Comments, Opinions and Conclusions of the Author.

The Assignment of Error to which the discussion under this topic will be directed relates to the admission in evidence of a portion of Exhibit 46 and denial of the motion to exclude the same. The portion of the exhibit involved is the report of H. Dean Campbell, a public accountant, accompanying his audit of the books of the Investment Finance Company. This report contains the *ex parte* comments, opinions and conclusions of the author, many of which were highly prejudicial.

Said Assignment of Error appears in full in the appendix hereto at page 34 and succeeding pages.

The ruling to which the said assignment relates appears in the Bill of Exceptions at pages 617, 921-922 of the record.

The objections, motions and proceedings to which said ruling relates appear in the Bill of Exceptions at pages 615-617, 916 of the record.

THE CHARGES CONTAINED IN THE CAMPBELL REPORT.

After presenting the question of whether the Investment Finance Company and the First Security are so closely interlocked as to appear identical in effect; whether profits which might accrue to First Security would be di-

verted to the narrower limits of the fewer shareholders of the Investment Company to the loss of shareholders in the former company, and whether funds used to promote the various enterprises were basically the funds of First Security, the report proceeded to state that the questions should be answered as to whether the following substantially constitute fraud [the report expressly assumes the existence of said circumstances]. [R. 625]:

> "The purchase of First Security Deposit Corporation bonds at a discount, and the re-sale of these securities to that company at par, including accrued interest, retaining the profits in Investment Finance when, in practically no instance, had the First Security Deposit ever paid face value to the others?" [R. 626];
>
> "Taking over the Wilshire Insurance Agency, and directing commissions formerly earned by the First Security Deposit into the income of the Investment Finance?" [R. 626.]

That there had been "reinvestment in such mismanaged enterprises as Bonds-17" [R. 626];

That reinvestment in some of these companies "might on its face be construed to be fraud and mismanagement" [R. 626];

That "in some instances letters sent out by Mr. Cronk might be criticized as being misstatements of fact and still further, might bring the company (Investment Finance) under the S. E. C. because they were sent through the mails out of the state" [R. 626, 627];

That "in summarizing, it might appear that it might be difficult to justify legally the existence of the company in any particular, as it is now operating." [R. 627.]

The charges contained in the Campbell report were inadmissible as (1) hearsay, (2) relating to transactions outside the issues, and (3) were incompetent for the limited purpose for which they were admitted, *i. e.,* having no tendency to show intent on the part of defendants.

No issue was raised by the indictment as to the propriety of purchase of First Security bonds at a discount and resale to the company at par, nor as to retaining profits of such transaction in Investment Finance Company. Likewise, there was no issue as to diverting commissions formerly earned by First Security through Wilshire Insurance Company into the income of the Investment Finance Company, nor was there any evidence that this occurred or that such an insurance company existed. There was no issue as to the mismanagement of investments or enterprises nor as to the legal justification for the existence of the Investment Finance Company. Any misstatements of fact claimed to have been made were to be resolved by the jury uninfluenced by the opinion of Mr. Campbell.

All the charges, also, were clearly inadmissible within the rule that collateral transactions are inadmissible to establish a scheme to defraud.

In *Gold v. U. S.* (C. C. A. 8), 36 Fed. (2d) 16, 33, the indictment alleged a scheme to defraud by the use of the mails in the sale of bonds and stock of joint Stock Land

Bank. It was held that evidence of other independent transactions was inadmissible, the Court saying:

> "Evidence was allowed to be introduced showing the amount of compensation Guy Huston received from the Southern Minnesota Bank for selling its bonds prior to the transactions here in question; also that he received compensation from several other Joint Stock Land Banks for selling their securities. We think this evidence was inadmissible. Those transactions were entirely independent of the scheme alleged in the indictment. It was not shown or offered to be shown that all of the transactions were part of one system or plan being carried out by Guy Huston. It was not claimed that what was done by Guy Huston for which he was being tried was done unwittingly or unintentionally. On no ground that occurs to us were his independent dealings, either with the same bank or with other banks, admissible to prove the charges made against him in the indictment in the case at bar."

The cases are clear that an auditor or accountant is not even permitted to testify as to the ultimate questions to be determined by the jury; his testimony must be confined to the facts as revealed by the records and books. So that in the present case Mr. Campbell, even if called as a witness, could not have testified to the conclusions contained in the report (and he was present in the court room); much less, can his unsworn charges be received [R. 1166].

THE CAMPBELL STATEMENT COULD NOT BE ADMITTED AS EVIDENCE OF INTENT OR KNOWLEDGE ON THE PART OF DEFENDANTS WITHOUT ASSUMING THE TRUTH OF SUCH CHARGES, I.E., GIVING THEM THE EFFECT OF SUBSTANTIVE EVIDENCE.

In the case of *St. Claire v. U. S.* (C. C. A. 9), 23 Fed. (2d) 76-78, *supra,* page 102, the trial court expressly instructed the jury that letters from the Secretary of State to the defendants could not be considered as true as against the defendants and the statements could only be considered for the purpose of "showing knowledge" and of enabling them to understand the responses thereto by the defendants. This Court held that there was no basis for the admission of the letters to the defendant even within this limited scope, saying:

> "In other words, we can see no possible motive for offering this correspondence, except to get before the jury the incompetent, prejudicial statements contained in letters written by a state officer, condemning the enterprise in which the defendants were engaged as a swindle."

While a document reflects the intent of the declarant it does not equally reflect the intent or purpose of the recipient (*supra,* p. 99).

The Court recognized this principle in instructing with reference to evidence of intent of defendant Twombly, when he authorized the jury to determine whether or not Twombly himself believed the matters related in the statement prepared by himself [R. 1032]. The effect of the instruction of the Court was that Twombly's statement would not even bind him if he did not believe the statements to be true.

Certainly the principle would apply equally to these defendants and they would not be bound by the Campbell report unless they believed the conclusions to be true. This rule is especially applicable to the defendants, as they did not prepare the report containing the charges which are relied upon as evidence of their intent or knowledge.

The error in admitting this evidence was aggravated by the use which the prosecution was permitted to make of it in their argument to the jury. Counsel for the prosecution was permitted to read the Campbell charges to the jury and to make the specific contention that the particular charges contained in the Campbell audit had been established by the proof [R. 960, *infra* Point X].

POINT X.

Assignment of Error XXVI.

The District Court Erred in His Rulings With Respect to Certain Motions to Instruct the Jury to Disregard Portions of the Remarks of Plaintiff's Counsel Concerning Plaintiff's Exhibit 46 Made in the Closing Argument to the Jury and in His Comments With Respect Thereto.

The Assignment of Error to which the discussion under this topic will be directed relates to the argument of plaintiff's counsel on the H. Dean Campbell report [Plaintiff's Exhibit 46], and the Court's comments made in connection with the proceedings thereon.

Said Assignment of Error appears in full in the appendix hereto at page 41 and succeeding pages.

The rulings to which the said assignment relates appears in the Bill of Exceptions at pages 953 to 960 of the record.

The motions and proceedings to which such rulings relate appear in the Bill of Exceptions at pages 953-960 of the record.

As we have seen in the preceding Point IX, the charges contained in the Campbell report were not properly admissible in evidence.

Counsel for the prosecution not only read the charges contained in the Campbell report, but asserted that these charges had been established as true. Counsel's illegal use of this evidence in order to accomplish the very purpose which prompted the Court's limitation of its use was error of a grave character.

In *Waldron v. Waldron,* 156 U. S. 361, 380-384, 39 L. Ed. 453, 458-460, the Court reversed the judgment, not so much upon the ground of the inadmissibility of the evidence in the first place, but by reason of its improper use by counsel in his argument. The Court said:

> "It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and it is equally well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor."
>
> "* * * The record which was admitted for a limited purpose had no tendency to establish her guilt of that charge, if used only for the object for which it was allowed to be introduced. * * * The admission of the record and other testimony having

been thus obtained, in the closing argument for plaintiff, all the restrictions imposed by the court were transgressed and the evidence was used by counsel in order to accomplish the very purpose for which its use had been forbidden at the time of its admission.

"Indeed, when the statements made by plaintiff's counsel in opening are considered, it seems clear that the failure to obtain the admission of the divorce proceedings in full left the case in such a condition that much of the subsequent testimony introduced, while it proved nothing intrinsically, was well adapted to fortify unlawful statements which might thereafter be made in reference to those proceedings. Thus, the case in its entire aspect, was seemingly conducted in such a manner as to render the illegal use of evidence possible and to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous."

Equally in the present case, the trial court had admitted the hearsay charges of the Campbell report for the limited purpose of the intent of defendants. Yet, counsel for the Government, in his closing argument, read these unsworn charges to the jury and asserted expressly that these charges, which he had read and which he again summarized in his argument, were true.

Prompt objection was made by the defendants but the trial court instead of censuring plaintiff's counsel or ordering the remarks to be withdrawn, permitted them to be continued so long as he did not go outside the record [R. 958, 959]. Plaintiff's counsel then read to the jury the conclusions of the report and proceeded to assert that the Government's evidence had established each of the

charges. The objection thereto was disallowed by the trial court [R. 960, 961].

There was some reliance by the prosecution in argument upon the theory that counsel for one of the defendants, by asserting that there was no evidence in this case in the first place "to support the charges that are made" [R. 957] had opened the door and thus justified Government's counsel in arguing the truth of the charges [R. 955, 956]. The Court stated in response to the defendants' objections to the above line of argument by the prosecution, "you were the one that raised it" [R. 956].

It is submitted that under the decisions it was incumbent upon the Court and counsel to confine the argument to the evidence and to the only legitimate purpose of that evidence under the rule of *Waldon v. Waldon, supra,* and that plaintiff's departure from this principle was not excused by the ambiguous assertion attributed to counsel for defendant.

In *People v. Cook,* 148 Cal. 334, 349, the prosecuting attorney in his closing argument went outside the record to reflect upon defendant's motive for the prosecution of one Ferguson. The trial court ruled that defendant's attorney by referring in his argument to the Ferguson trial, and to the action of defendant with reference to Ferguson, had "let the door open." The judgment was reversed, the Court saying:

> "And it was no excuse for the misconduct that the counsel for defendant had referred in his argument to the Ferguson trial. In the case of People v. Kramer, 117 Cal. 650 (49 Pac. 842, this court said in response to this excuse for similar misconduct: 'Assuming that the comments of the district

attorney were not warranted by the evidence, his act would not be justified by the fact that defendant's counsel had already committed a like impropriety. The proper way to correct such an abuse of privilege on the part of either counsel is for his adversary to call it to the attention of the court and have it stopped.' We cannot too strongly insist upon the observance of this admonition, as the only mode of confining criminal trials within proper limits, or conducting them with proper decorum, or—which is vastly more important—preserving the right of the defendant to be convicted only upon legal evidence addressed to the charge upon which he is being tried."

To the same effect is *People v. Simon,* 80 Cal. App. 675, 685.

POINT XI.

Assignment of Error XXVII.

The District Court Erred and Was Guilty of Misconduct Prejudicial to the Appellant Edgerton in Intimating, Suggesting, Requesting and Insisting that the Defendants Should Stipulate to Certain Facts Rather Than Require the Plaintiff to Prove the Same.

The Assignment of Error to which the discussion under this topic will be directed, relates to the misconduct of the trial court during the course of the trial, when he repeatedly intimated, suggested, requested and insisted that the defendants should stipulate to certain facts, rather than require the plaintiff to assume the burden of proving them.

The portion of said Assignment of Error relied on, is printed in full in the appendix hereto at page 49 and succeeding pages.

The various statements of the trial court to which said Assignment relates, is printed in the Bill of Exceptions, at pages 89-90, 99-105, 136-137, 143-145, 218-219, 231-232, 251-256, 267-268 and 611-615 of the record.

Throughout the trial, the Court exhibited the utmost impatience with any objections interposed by defendants which would require the prosecution to show a foundation for the admission of documents and other matters in evidence. The Court continually lectured the attorneys for the defendants to the effect that a vast amount of time was being consumed in technicalities, and expressly stated on several occasions that defendants should stipulate to the admission of various items of evidence. Finally, when a stipulation which had been entered into, was withdrawn by counsel for one of the defendants, the Court insisted that from that time on each defendant would be required to make an objection and take an exception to each ruling of the Court, and that the stipulation theretofore entered into with reference to continuing objections and exceptions to evidence of a similar character, would no longer be recognized. However, the trial court recognized the legal validity of the objections which he thus criticized, and when they were not withdrawn, he sustained them; but his attitude toward defendants' counsel and repeated censure were calculated to, and did convey to the jury the impression that defendants' counsel were obstructing continually the orderly trial of the case.

Incidents of such misconduct on the part of the trial judge will be briefly summarized:

(1) In connection with the offer of the Articles of Incorporation of First Security, and an amendment thereof, while the County Clerk was on the stand, and after one of defendants' counsel had suggested that until counsel could examine the documents during the recess, that said documents be marked for identification, and the prosecutor had himself requested that the documents be marked for identification, the Court stated in the presence of the jury,

> "The Court: I am not in the habit of wasting the time of the court and jury on examinations of documents * * *. And now, clearly, there is nothing secret about these Articles of Incorporation and the Amendment. They either are or aren't. They should have been stipulated to and this could all have been done in five minutes." [R. 89, 90.]

> "The Court: * * * We have a lot of things to take care of without a lot of *technicalities*. * * * I am not going to waste the time of myself and the time of the Jury while a lot of *technical* objections that are of no value, except to take the time of the court and jury, are entered into. Proceed." [R. 90.]

(2) At the very beginning of the case, and just prior to the examination of plaintiff's witness, Milton Shaw, Chief Examiner State Building and Loan Commission, the Court stated in the presence of the jury:

> "The Court: * * * Now I don't believe that it is going to be necessary for counsel to continue to take the time of the court and jury to make the objection that the evidence is being put in out of

order, and that the conspiracy hasn't been yet proved and so on and so forth, where I am reserving to them the right to strike. * * * The only thing I say is that I shall give you a right to move to strike in the event something isn't connected up. That is going to save every time you get an idea that something isn't in chronological order each one of you getting up and moving to strike on the ground that something else hasn't yet been proved. * * * If you are perfectly satisfied that those records are the records of the State Corporation Department and that they are proper records of that department, why waste the time for the four of you to get up and make the objection and compel the government to go and (get) the witness back and put him on the stand and go through the formalities which you know perfectly well they are going to be able to get through just to make a *technical* point. That is why I objected to an objection to a document from the Secretary of State's office. Why object to an exemplified copy or to any particular copy and compel a lot of time to be taken which, in the long run, is of no value to any one except the delight of the lawyer to make technical objections and have them sustained." [R. 100, 102, 103-104.]

(3) "The Court: * * * I see no way, unless we are going to be here to celebrate Christmas and New Years, to do it otherwise than to get these books before the court and get them in, * * *.

"But I shan't stay here until Christmas to satisfy a lot of *technical* niceties. * * *" [R. 136.]

"But we can conceivably, with five or six *technical* lawyers, take three weeks on one book. * * *

I have seen *technical* lawyers keep a court going for three weeks on getting in one book. That has

been in the past quite a common experience." [R. 137.]

(4) "The Court: (With reference to the attorney's duty to examine the records of the State Corporation Department and the Building and Loan Commissioner) —I don't propose to stop the trial and keep the jury here while they examine records which, in the exercise of their duty as the attorneys, they should have examined some time ago, as I am satisfied they did examine. * * * I sometimes may seem a little critical of lawyers who try criminal cases because I think they use all the *tricks* in the bag by way of *technicalities,* and I usually try to prevent as much of that as I can where I think it is just a waste of time, and where we aren't getting anywhere by it. That is why I made the statement I did when objection was made to the introduction in evidence of a document from the Secretary of State's Office." [R. 144, 145.]

(5) "The Court: Well, it does seem to me that there is someone among the defendants who knows whether those are the books and records of the corporation, * * * and that they are sufficiently interested to shorten the time of trial. I suppose it would take somewhere between five and ten days to prove all of these, possibly considerably longer, and it would require the bringing in of a number of witnesses. Now, if the defendants and their counsel wish it that way, there is nothing I can do about it." [R. 218.]

(6) During the examination of plaintiff's witness Perkins, the Court stated before the jury:

"The Court: Now, I think that we waste a lot of time by these questions as to numbers. I am not going to require the plaintiff to put these documents

in according to any particular order, and counsel will simply have to take the number and check afterwards, instead of wasting the time of the court during these short sessions." [R. 232.]

(7) During the course of the examination of plaintiff's witness Bruce, the Court stated before the jury after such witness had been asked to state from his examination what the by-laws provided as to the number of directors of a corporation, and counsel for defendant had interposed the objection—"That is not the best evidence."

> "The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of any one, all of this detailed information, when it is available in summarized form; * * * Why should we take ten days to accomplish a thing that can be done in a couple of hours." [R. 251.]

(8) After counsel for appellant had stated that he had no objections to any chart or pictorial representation as to whatever the facts are, the Court stated in the presence of the jury,

> "The Court: But you did object and require the examination of the witness and required the production of all of the original documents to prove it. Now what is your position?" [R. 254.]

When counsel stated that he was anticipating the witness attempting to summarize the minutes of the meeting of the board of directors, the Court stated:

> "The Court: What I am trying to do here, and when I suggested the preparation of these schedules, was to save time. That doesn't seem to have been effective because you have objected to the schedules produced to permit a stipulation with regard to them, and now you have objected to the testimony of the witness who prepared the schedules, and have insisted upon going back to the original documents.
>
> Now, I want to know: what is your position? You either object or you don't object." [R. 254.]

When counsel for defendant again protested that he was not trying to be obstreperous or to consume time, but was simply anticipating what the witness was going to testify as to the contents of the minutes, the following occurred,

> "The Court: When the schedule was attempted to be introduced, you (referring to Mr. Lawson, counsel for appellant) objected to it on the ground that it was a summary, although nothing was said at the conference before the bench, nor was any objection made by you, so far as I know, at the time it was proposed. Now, if your position is that you object to it, I want to know it, because then it can't be used. It can only be used, as I explained in the first place, by agreement of all counsel in order to save time. If you object to this witness testifying as to what he has gleaned from these books, your objections then will have to be sustained and we will have to have each one of these entries read to the jury. We will have to go back and read the Articles

of Incorporation, * * * dealing with the capital structure; have to read that portion of the by-laws dealing with the number of directors; we will have to read each minute of each corporation * * *." [R. 256.]

(9) During the course of the examination of plaintiff's witness Bruce, the Court volunteered the statement before the jury,

> "The Court: I think possibly I ought to make it clear that no past objections will be given any validity now at our change of plan or program. I only permitted the objection to hang over because I thought we were trying to save time. From now on the objections must be made specifically and exception saved at each point as to each defendant." [R. 268.]

(10) After counsel for appellant had suggested that it would be necessary for him to ask whether some of the defendants were present at certain director's meetings and if any directors were absent, to interpose the objection of hearsay, the following occurred in the presence of the jury,

> "The Court: You will have to make a *technical* objection if we are going to have to go back to all of the original documents and take the time to go into those. You are not able to stipulate as to who are officers and directors of this corporation from time to time, the stock that was outstanding, etc., and we have to go back to the original; so there will be no other way to it, than for you to make objection.
>
> Now, as I understand it, you were willing to so stipulate, but there is nothing that I can do about it so long as counsel for one of the defendants make

objection. The objection is sustained, and we will have to go to the original records and all defendants will have to be governed then accordingly." [R. 268.]

The foregoing instances typify the trial court's attitude throughout the trial.

At the very beginning of the trial, and before the opening statement to the jury, the Court stated,

> "The Court: * * * I am not interested in anything other than getting this case tried, and I don't want to listen to a lot of unnecessary discussion. I say, eliminate all argument." [R. 74.]

At the conclusion of plaintiff's opening statement the Court suggested that counsel get up a chart to put the names of the different corporations down on the chart in large type designating eight different companies and inquiring of the jury—"Now, wouldn't that be helpful to you gentlemen?" [R. 84-85.]

When defense counsel suggested that only three companies were involved, and that the addition of the names of the other corporations mentioned by counsel for the plaintiff in his opening statement and by the Court, would not be relevant to the case and would only lead to confusion, the Court stated:

> "Well, it isn't going to do any harm because certainly if I rule that the affairs connected with any one of these corporations on this chart are to be ignored by the Jury they are going to ignore it, * * * and yet I think the continuity is there * * *." [R. 86.]

The burden was upon the plaintiff to prove the crime charged and all the elements of that crime. It was improper for the trial court to transfer or attempt to transfer this burden from the plaintiff to facilitate the proof of plaintiff's case by the repeated insistences upon stipulations which would eliminate the requirements imposed by the law upon the plaintiff, or to deprive the defendants of their legal rights, including the right to object to hearsay evidence or to insufficient foundation.

That the Court's remarks were not provoked by any improper objections on the part of defendants' counsel, is evident from the fact that when the Court reached the point of ruling upon any of the objections which he censured so severely, he sustained such objections. Any other ruling by the Court would have been contrary to fundamental rules of evidence.

If any undue delay was occasioned by the fact that the prosecution offered in evidence bulky documents which had not theretofore been examined by defendants, it is obvious that counsel for defendants were not properly to blame for such delay. If counsel for the prosecution desired to present the case upon a stipulation as to the admissibility of any document, such document should first have been submitted to defendants' counsel. There is absolutely no evidence that this procedure was followed. Therefore, when defendants' counsel were confronted in Court for the first time by the offer of a large number of documents, it was entirely improper for the Court to make derogatory observations as to "criminal attorneys" and "legal technicalities" at every instance in which a proper objection to such evidence was inter-

posed, because of insufficient foundation or the hearsay rule.

The speedy conclusion of a criminal trial is not an end in itself. The principal solicitude of the law is to insure that justice is done. The strictures which the Court so often indulged in at the expense of defendants' counsel, could not fail to react unfavorably upon the defendants.

It has been held in many decisions of the Federal Courts that the foremost duty of the trial judge is to so conduct himself as to insure, that by no act or word of his, will the jury be influenced adversely to defendants.

In the recent case of *United States v. Minuse* (C. C. A. 2), 114 Fed. (2d) 36, 39, the Court said:

> "In spite of the very strong case presented against them (defendants), we are constrained to hold that they did not get a fair trial, and that accordingly the judgment must be reversed." (p. 38.)

After referring to a number of rulings on evidence, the Court said with reference to the issue of misconduct on the part of the trial court:

> "In other instances the court exhibited unreasonable impatience with defendants' counsel and failed to maintain that detached and impartial attitude which is necessary to preserve a proper atmosphere and to insure a fair trial. Furthermore, there plainly was no justification for the constant interference by the court with counsel in their attempt to examine their witnesses."

In *Lambert v. United States* (C. C. A. 5), 101 Fed. (2d) 960, 964, a judgment of conviction was reversed by reason of the brusqueness and severity of some of the remarks of the trial court which deprived defendant of a fair trial. During the cross-examination of one of the government witnesses, defendant's attorney repeatedly asked several questions, to which an objection was sustained, and counsel for defendant interpreted the trial court's ruling as in effect denying him the right to cross-examine. The Appellate Court pointed out that the questions propounded by the defense counsel were perhaps too general and that he had misunderstood the purpose or effect of the trial court's ruling, but stated,

> "* * * the misunderstanding, pursued by counsel with persistence, perhaps with contumacy, caused so serious and heated a disagreement with the Court and an atmosphere so tense as to hinder, if not entirely prevent, a fair trial.
>
> "If it is replied to this that it was the untactful, contentious, disagreeable, and almost personally offensive manner in which appellant's counsel conducted his case which brought down upon him the very mildly disciplinary action of the court, the record plainly shows that appellant's counsel was, in good faith, if not with good judgment, tact and finesse, endeavoring to represent his client to the best of his ability. And in the end it was not counsel, but client, who suffered from his counsel's irascibility and provocativeness, and the District Judge's response to it. In situations of this kind, while the Judge

should certainly preserve and protect the dignity of the court the greatest care should be exercised in doing it, so as not to react upon the defendant himself, who at least as to the controversy between court and counsel, is a wholly innocent bystander."

In re Parkside Housing Project-Connor, etc., Ave., 290 Mich. 582, 287 N. W. 571, 575-578, the Court said:

"It is error for the Court to comment, unfavorably, in the presence of the jury, on the conduct of the trial by counsel for one of the parties, especially in view of the fact that counsel, in such a situation, is without opportunity to resent such criticism without risk to himself and injury to his client's cause with the jury . . .

Even when counsel makes contentions which are not deemed sound, the trial judge should overrule them with dignity, and not use language holding counsel up to ridicule . . .

Judges are required to exercise great care to say nothing in the hearing of the jurors while a case is progressing which can possibly be construed to the prejudice of either party . . ." (p. 577.)

"Judicial intimation, derogatory remarks, ridicule and harassment on the part of a judge during the trial of a case have no place in a court of justice." (p. 578.)

To the same effect is:

Davis v. Pezel, 131 Cal. App. 46, 50-54 (Opinion by Justice Stephens).

POINT XII.

Assignment of Error XXVIII.

The District Court Erred and Was Guilty of Misconduct Prejudicial to the Appellant Edgerton in Statements Made Before the Jury.

The Assignment of Error above referred to relates to statements of the District Court in the presence of the jury which were greatly prejudicial to the rights of the appellant.

Said Assignment is set forth in full in the appendix hereto at page 71 and succeeding pages. The statements of the Court upon which error is assigned, appear in the Bill of Exceptions at pages 197-198, 227-228, 251, 616-617, 679-680, 698 and 818 of the record.

This Assignment of Error must be considered in connection with the assignment previously discussed, which latter assignment is incorporated in the present assignment by reference in certain particulars [R. 1140]. The incorporated paragraphs referred to contain the matters summarized in paragraphs (1), (2), (6), (7), (8), (9) and (10), respectively, Point Number XI, *supra,* pages 130, 132-135.

Additional instances of misconduct may be summarized as follows:

(1) During the course of the examination of plaintiff's witness Florence Anderson, the question was asked "Can you definitely state that those names which I have

given you with the addition of Brayton were directors as of that date?" Counsel for defendant suggested:

> "Mr. Irwin: Pardon me, your Honor. I hate to interrupt but I think that is misleading, that last question, that those he has named with the addition of Brayton were directors. We know that there were at least seven or nine and he has a list in front of him, I think we are entitled to have the entire board."

Thereupon, the Court stated:

> "The Court: Now, I am not going to have to call this to your attention again. The plaintiff is entitled to put in its case * * * You may bring out those matters on cross-examination and *I shall not tolerate any more interruptions of that sort.*" [R. 197-198.]

(2) During the course of the examination of plaintiff's witness Perkins, plaintiff's counsel asked permission from defendant's counsel to remove two letters attached to an exhibit which had been offered and received in evidence. After counsel for defendant had consented, the following occurred:

> "The Court: Just say yes and save a lot (of) time.
>
> Mr. Lawson: Your Honor, I want to call your Honor's attention to what I think is—
>
> The Court: (Interrupting): I don't want any discussion in front of the jury. You consent. That is all that is necessary.
>
> Mr. Lawson: I consent, provided he goes all the way.

The Court: I want the jury to get their evidence from the witnesses and not from the lawyers." [R. 228.]

(3) The Court said during the examination of the plaintiff's witness Bruce,

"The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book * * * Why should we take ten days to accomplish a thing that can be done in a couple of hours." [R. 251.]

(4) Upon the offer of Plaintiff's Exhibit 46 (containing the conclusions and opinions of an auditor who did not testify at the trial, an objection having been interposed to such opinions and conclusions upon the ground that if the witness were on the stand himself he wouldn't be permitted on objection to testify to such opinions and conclusions), the Court stated:

"The Court: I disagree with you on that * * * You mean to tell me that if that auditor told these defendants that he [would not be] permitted to say that he told them in person?"

To which counsel for appellant replied,

"Under the circumstances of this case I would take that position, your Honor."

The Court then stated,

"The Court: Then that is a matter that will have to go to the Circuit [Court], I disagree with you on it." [R. 616-617.]

(5) During the course of the examination of the plaintiff's witness Grace Benn, she testified that she thought "the gentleman I talked with that time was Mr. Ireland." Whereupon, the following occurred,

> "The Court: Will you in the brown suit stand up?
>
> (The gentleman arose as requested.)
>
> The Court: Is that Mr. Ireland?
>
> The Witness: I don't think so."

Thereupon, the Court directed each of the defendants singly to stand and inquired in each instance as to whether or not such defendant was the person with whom she talked. Upon receiving a negative answer, the following occurred,

> "The Court: You are Mr. Ireland, are you not?
>
> The Defendant Ireland: Yes, your Honor.
>
> The Court: Stand up again. Is that the man you talked to if you know? (The defendant Ireland arose as requested.)
>
> The Witness: No, I don't think so." [R. 679-680.]

(6) During the course of the examination of plaintiff's witness Audra D. Jones, the trial court indulged in precisely the same practice as above indicated as occurring in paragraph (5) above, directing each defendant successively to stand and inquired of the witness if such defendant was the person with whom she had the conversation with respect to which she testified. [R. 698.]

(7) Upon the introduction in evidence of Plaintiff's Exhibit 39, which recited details concerning financial

transactions of the Investment Finance with the Pierce Petroleum and Charles E. and Maryan A. Kenner, and subsequent to the admission in evidence of Plaintiff's Exhibit 216 (the Twombly statement referred to *supra* at page 91, in which he characterized one Kenner as an ex-convict and present resident of Folsom penitentiary), the Court volunteered the following statement:

> "The Court: Now, gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly." [R. 818.]

The foregoing instances which are typical of other instances occurring throughout the trial, including the instances of misconduct referred to in Point VI, demonstrate clearly the Court's antagonistic attitude toward the defendants and their attorneys. Without apparent provocation, the Court treated a suggestion that the witness name the entire board of directors as an interruption of a sort which he would not tolerate, and when defense counsel sought to call the Court's attention "to what I think is—" the Court immediately interrupted to lecture the attorney, stating "I want the jury to get their evidence from the witnesses and not from the lawyers."

On occasions the Court stated that he disagreed with defendants' counsel on points of law, and on one of these occasions stated that the matter would have to go to this Court because of such disagreement. (This statement could constitute nothing less than an assumption of defendant's guilt.)

In the case of each of the two witnesses who indicated that they had had conversations either with Mr. Ireland in one instance or with one of the defendants in another, the Court in an endeavor to have the particular defendant definitely identified, and thus confirm the testimony of the witness, compelled each defendant in turn to rise and confront the witness and finally pointed out the defendant Ireland and ordered him to stand again, and asked the witness who had mentioned his name whether he was the man with whom she had spoken.

None of these incidents could have been without their effect upon the jury and when their accumulative effect is considered, the conclusion is inevitable that the Court's misconduct prevented a fair trial.

As this Court has pointed out in *Williams v. United States* (C. C. A. 9), 93 Fed. (2d) 685, 687, a contention that the trial court has committed prejudicial misconduct is not affected by the fact that the trial judge is not intentionally unfair:

> "* * * the harm done is not diminished where the Judge, by reason of unrestrained zeal, or through inadvertence, departs from 'that attitude of disinterestedness which is the foundation of a fair and impartial trial.' "

The authorities cited in the foregoing Point XII, *supra,* pages 138-9 *et seq.,* which impose upon the trial judge the duty of complete disinterestedness as between the parties, are equally applicable in support of this Assignment.

POINT XIII.

Assignment of Error XX.

Both the Trial Court and Counsel for the Plaintiff Made Statements of Fact During the Course of Plaintiff's Closing Argument to the Jury, Concerning Which There Was No Evidence.

The Assignment of Error to which the discussion under this topic will be directed relates to both statements of the Court and counsel for the plaintiff that the defendants misrepresented to investors the manner in which the money of said investors would be invested, in the absence of any evidence of such a representation.

Said Assignment appears in full in the appendix hereto at page 76, and succeeding pages. The statements to which this Assignment of Error relate and the objections thereto appear in the Bill of Exceptions at pages 949 to 953 of the record.

Plaintiff's counsel argued that

> "The investors * * * had the right to rely upon the fact that such representations and promises (the plan, agreement and declaration of trust) would be kept at all times." [R. 951.]

Plaintiff's counsel continued, telling the jury

> "In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business. That is the purpose and object of my company, and that is what we are going to do with the money.'

So you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that your friend is operating a hotel, and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. *This was the object and purpose.*'

'Oh, no,' says he, 'Look down here in paragraph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes to the situation we have here. *These people were told,* or at least they were intended to be told, and for practical purposes they were told *through this plan and agreement that the money would be invested in certain ways.*

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct the jury to disregard it.

The Court: Read the statement, please.

(Statement read.)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that

the text of that plan was available to all of them. * * *

Mr. Irwin: * * * but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that." [R. 950-953.]

No representation was made to any person that the First Security would invest its funds only in loans secured by securities or properties approved as legal investments. No witness testified to having read the Plan and Agreement or that anyone ever represented to them that the First Security would only invest its funds in approved legal investments, nor was any letter or communication to that effect received in evidence.

The allusion of the Court was undoubtedly rooted in the testimony of the witness Tallamantes [R. 658]. This witness was asked,

"Q. Mrs. Tallamantes, as guardian of your son Jack Winston, did you have submitted to you a plan from the reorganization committee of the First Security Deposit Corporation inviting you to accept their plan and exchange your securities, which you then held in the—

Mr. Adams: Objected to as leading and suggestive. * * *

The Court: Well it is a preliminary question.

Q. In which there was submitted to you a plan by the reorganization committee of the First Security Deposit Corporation? Was there such a plan submitted to you * * *? A. I *think* there was a printed plan.

Q. Mrs. Tallamantes, I will ask you if you exchanged your securities * * * after there had been submitted to you the plan which I just asked you about? A. I think I did, I am a little hazy about it. I have seen the plan before that. * * *

Mr. Lawson: I thought counsel was going to follow that up and show us what the plan was. Now he says you have seen a plan. What is the plan? I don't know what he refers to.

The Court: You can't try his case. * * * He has asked for a plan and she said 'yes.' * * *.

Mr. Irwin: * * * might that question where she was asked about the plan, if she received the plan—might it be considered stricken? There are several objections that—might be interposed, that it calls for a conclusion * * * and not the best evidence * * *

The Court: When you said, 'the plan,' you are referring to any particular plan, or just to a plan of reorganization?

The Witness: Just a plan of reorganization.

The Court: The objection will be overruled. Exception." [R. 658-660.]

There is no evidence that the plan was ever circulated. The only evidence in the record is Exhibit 131, a brochure inviting investors to deposit their securities, but this exhibit contains no representations whatsoever concerning the nature and character of the proposed business pur-

poses of the First Security being to loan money only on legal investments. (*Supra,* p. 67.)

The trial court's refusal to restrain the prosecutor's argument in this regard and unwarranted confirmation thereof constituted prejudicial error.

Waldron v. Waldron, 156 U. S. 360, 380; 39 L. Ed. 453, 458, *supra,* p. 125.

Panama Electric Co. v. Moyers (C. C. A. 5), 259 Fed. 219, 220;

Gee v. Fong Poy, 88 Cal. App. 640-647;

Davis v. Pezel, 131 Cal. App. 46, 50-54 (Opinion by Justice Stephens).

POINT XIV.

Assignments of Error XXIII and XXIV.

The Trial Court Erred in Sustaining Objections of the Plaintiff to Certain Questions Propounded on Cross-Examination to Certain of Plaintiff's Witnesses Concerning Their Activities in Ascertaining the Market Price of Securities of the First Security and Their Knowledge as to the Market Price.

Assignments XXIII and XXIV are respectively printed in full in the appendix hereto at pages 80 and 84.

The rulings to which these assignments relate appear in the Bill of Exceptions at pages 456-460, and 437 of the record.

These assignments relate to the cross-examination of plaintiff's investor-witness Wright and her banker-agent Richmond.

Upon the identification of Exhibit 144 by the witness Wright as one received by her, the same was received in evidence. This letter recited, "What is the present market value of my First Security Deposit Corporation bonds? Is it possible for me to now realize immediate cash and suffer no severe loss?" Also, this witness identified Exhibit 145 as a letter received by her. This letter recited, "We now have available funds with which to purchase First Security Deposit Corporation bonds, and for limited period will pay best market price available for any who desire or need money at this time * * *." The witness, in reply, wrote the Investment Finance Company, "Will you kindly advise me what the best cash market price is for this stock at the present time." She testified she received a reply reciting, "Please be advised that we can enable you to procure the sum of $619.94" for her securities. Plaintiff's Exhibit 152 to the witness recites, "Replying to your letter of August 6, 1938 regarding securities of the First Security Deposit Corporation * * * we can obtain for you total of $662.65 * * *" The witness testified she was the owner of certain preferred stock and a bond of the face value of $854.20 of the First Security, and identified Plaintiff's Exhibits 144-152, respectively, as letters which were received by her from the Investment Finance or written by her to the Investment Finance [R. 414, 416, 419, 427, 430, 441, 445-455].

Plaintiff stated with respect to the offer of these letters that they were "offered to show that this course of relationship had been established between the company and the witness * * * and * * * offers were made from time to time of varied amounts for her stock and

certificates"; also, that the purpose was "to show that the statements made to the witness were false" [R. 443, 457].

On cross-examination, her attention was directed to Plaintiff's Exhibit 145 which recited that the First Security had funds available and would "for a limited period * * * pay the best cash market price available," and also asked if after the receipt of that letter if she made "any effort to determine what was the market price of those securities," to which question the witness answered, "I believe not." She was then asked:

> "Q. Did you question Mr. Richmond with reference as to that matter of market price?"

Objection was sustained on the ground that it was not proper cross-examination, and an exception noted [R. 456-457].

The witness testified on direct examination that in response to Plaintiff's Exhibit 152, reciting, "Replying to your letter of August 6, 1938 regarding securities * * * we can obtain for you a total of $662.65 * * *," she sold her securities to the Investment Finance for that amount [R. 453-454]. On cross-examination, her attention was called to this exhibit and she was asked: "Now, at that time did you have any information or independent knowledge of your own as to the market price of those securities?" An objection was sustained on the ground that it was improper cross-examination and an exception noted [R. 459].

The witness Richmond, on direct examination, testified he had occasion to represent the witness Wright with respect to her securities in the First Security and wrote

several letters on her behalf; and that he was a banker. He testified that he wrote to the First Security inquiring if she should sell the securities on the market at the present time, and "Can you tell us about what she should receive for them"; that he received a reply [Exhibit 155] from the First Security reciting, "We understand the market on these securities at the present time to be in the neighborhood of 75% of the face on the bonds and 10% on the stock." [R. 433-435, 869-870.]

On cross-examination, the witness Richmond testified he was acting for Mrs. Wright in connection with the matter, in a sense was her financial adviser, talked to her about the transaction, and when asked if he had made any independent investigation, answered, "I wrote several letters to California banks, to Los Angeles banks." This witness was then asked:

> "Q. Inquiring, I presume, as to the value? A. As to the market; yes.
>
> Q. Did you get some replies on that? A. I did."

The witness was then asked successively as to what information he received from the banks, if he advised Mrs. Wright with reference to the sale of her securities after receiving such information, and whether he gave her any advice with reference to the contents of the letter, Plaintiff's Exhibit 155. None of these questions was permitted to be answered, objections of the plaintiff thereto on the ground that they were not proper cross-exam-

ination, were sustained. To these rulings of the Court the defendants noted an exception [R. 435-439].

It is the contention of the appellant that the trial court erroneously restricted cross-examination upon a vital issue in the case. The very basis upon which this testimony and correspondence was offered justified the cross-examination. It is the contention of the appellant that the recitals in the correspondence as to offering "the best cash market price" were not false, but true. The witnesses sought from the company itself offers for the purchase of the securities and information as to the then existing market on these securities. They testified that ultimately an offer was accepted and the securities sold after efforts had been made to ascertain from independent sources knowledge as to the market price of the securities. Under these circumstances, the activities of the witnesses to learn what the market price was and their knowledge in that regard was legitimate cross-examination.

It is no answer to a refusal to permit a full cross-examination that the party against whom the witness was called to testify might have made him his own witness and then have propounded to him the questions to which he was entitled to answers upon the cross-examination. No one is required to make his adversary's witness his own to explain or fill up a transaction partially explained already.

Nor is it any answer to the refusal to permit a cross-examination that it would develop an affirmative defense.

If a witness, upon direct examination, is led to disclose a part of a transaction, the whole of which constitutes an affirmative defense, that fact does not deprive the defendant of his right to prove the entire transaction by the same witness upon his cross-examination.

Answers to the questions on cross-examination could have disproved the assertion that the representations as to market prices were false and proved that the witness was not defrauded, because she received the market price or better for her securities.

Any questions which fill up omissions, whether designed or accidental, are ligitimate and proper on cross-examination. When the answers are given, the nature and extent of the transaction become known from a comparison of the whole, and each fact material to a comprehension of the rest is equally important and pertinent.

Under the authorities, the foregoing cross-examination should have been permitted.

Alford v. U. S., 282 U. S. 628, 75 L. Ed. 624;

Heard v. U. S. (C. C. A. 8), 255 Fed. 829, 832;

Cossack v. U. S. (C. C. A. 9), 63 Fed. (2d) 511, 516;

Resurrection Gold Min. Co v. Fortune Gold Min. Co. (C. C. A. 8), 129 Fed. 668, 675-678;

Minner v. U. S. (C. C. A. 10), 57 Fed. (2d) 506, 512.

POINT XV.

Assignments of Error XXXIV to XXXIX, Inclusive.

The Trial Court Erred in Overruling the Objections of Defendant to Testimony of Investments or Transactions by Investment Finance Co. Entirely Outside the Issues Presented by the Indictment, and in Denying Motions to Strike Such Testimony.

Assignments XXXIV to XXXIX are printed in full in the appendix hereto at pages 86 to 96.

These various assignments all relate to investments or transactions by Investment Finance Co. and present the same legal question of the admissibility of this type of evidence.

The ground of objection in each instance was that the particular investment criticized was not within the issues presented by the indictment which charged a completed offense of advancing of money or property to the Investment Finance Company; that it had no evidentiary value as to the scheme charged and related to a collateral, separate, distinct and isolated venture.

The transactions involved in the assignments are briefly set out in the discussion of facts, *supra,* pp. 29-32. They are the following:

(1) Transactions between Investment Finance and Pierce Petroleum Corporation [R. 604, 611, 802-807, 817-818, 916 and 922];

(2) Investments of Investment Finance in stock of Pacific Brick Company [R. 822, 856 *et seq.,* 920 and 922];

(3) Loan of money by Investment Finance to Bond 17 Dog Food Company and purchase of stock of said company [R. 856 *et seq.*];

(4) Purchase by Investment Finance of stock in American Building and Investment Company [R. 856 *et seq.*, 912 and 922];

(5) Purchase by Investment Finance of stock in American National Bank of Santa Monica. [R. 374-375, 856, 910 and 922.]

The foregoing transactions are referred to as the basis of Assignments XXXIV to XXXVIII, respectively.

The indictment made no reference whatever to any of these transactions or to any loan of money or advance *by* Investment Finance. The charge was merely that the funds of First Security were loaned and diverted to defendants and to Investment Finance. [R. 7, 9.]

The ground upon which such evidence was received by the trial court, as he announced to the jury, was that it was material to that allegation of the indictment to the effect that "money of the company was to be invested only in securities which were approved by the Superintendent of Banks or by the State Corporation Department." [R. 869.]

However, when the trial court struck this allegation from the indictment (Point I, *supra*, p. 53) he eliminated from the case the basis upon which these collateral transactions were admitted. It follows that the motions to strike such evidence should have been granted.

The only purpose actually served by such evidence was to furnish integument or indicia of verity to the unsworn charges contained in the Twombley statement which re-

ferred in detail to each of these very transactions, characterized them in detail as wanton breaches of trust which caused losses of several hundred thousand dollars to the investors—the entire responsibility for which the Twombly statement placed upon this appellant's shoulders. (Point VI, *supra,* p. 88.)

As we have seen, evidence of such collateral transactions is universally regarded as prejudicial.

> *Gold v. U. S.* (C. C. A. 8), 36 Fed. (2d) 16, 33, *supra,* p. 121.

When as here such collateral transactions are shown—not for their effect as substantive evidence—but with the *inevitable result of documenting and reinforcing the accusations of the Twombly statement referring to such transactions and inculpating appellant* (*supra,* pp. 125-126), the inference of prejudice is inescapable.

Conclusion.

We regret that it has been necessary to extend this brief to such length, and will not attempt to recapitulate the many errors occurring at the trial.

We have shown the essentially cumulative effect of such errors culminating in a complete thwarting of the hearsay rule and in a direct violation of the constitutional right of the accused to be tried upon the charge presented by the grand jury—and none other.

The nature of the verdict itself is the clearest possible demonstration of the prejudicial impact upon the jury of this series of pyramided errors.

The jury's failure to convict any other officer or agent of the companies involved (other than defendant Twombly, the manager and author of the recital of accusations) shows that the full force of the trial court's erroneous rulings, instructions and comment, affecting this defendant and his counsel, was required to obtain a conviction.

It is accordingly submitted that error of a prejudicial character has been established in connection with each of the specifications relied upon, and that under the state of the evidence, the cumulative effect of such erroneous rulings, instructions, and comment was to deny appellant the essential elements of a fair trial.

It is submitted that the judgment should be reversed.

Respectfully submitted,

Otto Christensen,

Gordon Lawson,

Attorneys for Appellant J. Howard Edgerton.

APPENDIX.

[Assignment of Error XII; R. 1057-1060; Bill of Exceptions R. 1043-1045]:

Said District Court erred in denying the motion made by said defendant and appellant, after the jury had returned its verdict in the above entitled cause, finding him guilty on counts 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14, for judgment therein, for order arresting judgment on each of said counts, 1, 2, 4, 5, 6, 7, 9, 11, 12, 13 and 14, of the Bill of Indictment.

The grounds of said motion were and the grounds of said error in denying said motion were and are:

1. That there has been no verdict against the defendant sufficient to sustain a judgment of conviction or a sentence thereon inasmuch as the purported verdict returned by the jury is not a verdict based upon the indictment returned by the grand jury in this case.

2. That on the 3rd day of April, 1942, this court lost jurisdiction to further proceed with this case in any respect, and did not have jurisdiction to receive the purported verdict of the jury herein, and has not, subsequent to April 3, 1942, had any jurisdiction whatsoever in this action, for the reason that on said date the court in an instruction to the jury changed the indictment returned in this case by the grand jury, and required this defendant to be tried by the trial jury upon an indictment altered and different from the one returned by the grand jury, said instruction being given by the court on said date in the following language:

"The Court: The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your con-

sideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

"You are instructed to disregard the following words taken from the first paragraph on Page 5 of the indictment, beginning on the fourth line of said paragraph and page to wit: 'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.' This paragraph will then read, and you are to consider it as reading as follows:

" 'That the defendants would and did represent to the persons intended to be defrauded that the first Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

"No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

3. That the court erred in striking from the indictment the following language appearing on page 5 of said indictment:

"Theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations",

for the reason that this defendant was entitled to be tried by the indictment as rendered by the grand jury in this case, and the action of the court hereinabove enumerated deprived this defendant of the rights guaranteed to him by Article V of the Amendments to the Constitution of the United States.

4. That the court erred in treating that portion of the indictment hereinabove quoted as surplusage.

[Assignment of Error XIII, R. 1060-1062; Bill of Exceptions, R. 1000, 1038-1040]:

Said District Court erred in giving the following instructions to the Jury:

"The indictment in this case contains certain allegations which now, at the conclusion of the trial, the Court believes should be withdrawn from your consideration for reasons which it deems sufficient as a matter of law. Allegations which are immaterial to a determination of the issues may be considered to be surplusage and it may be for that reason that the Court is impelled to direct you to disregard them or there may be no proper evidence introduced in support of such allegation.

You are instructed to disregard the following words taken from the first paragraph on age 5 of the indictment, beginning in the fourth line of said paragraph and page, to wit:

'theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California.'

This paragraph will then read, and you are to consider it as reading, as follows:

'That the defendants would and did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants, and each of them, then and there well knew, large sums of money and property belonging to the said corporation were loaned and diverted to the defendants and to Investment Finance Company for the use and benefit of the defendants without any security whatsoever.'

No proof was offered upon that particular clause of that paragraph and I regard it as surplusage."

The exceptions with respect to the foregoing instructions were as follows:

"Mr. Irwin: Then, Your Honor, on this one I don't know if this is a proper one for an exception, or whether it should be reached another way. If I may state it, it is with reference to the lines that Your Honor struck out on Page 5.

The Court: Yes, this is the time to do it, and make an objection to that, and take an exception.

Mr. Irwin: Yes, Your Honor. I am quite in accord with Your Honor on the evidence, but the objection is made that the instruction should be that the whole allegation, since the evidence doesn't show any proof, should be deleted, and that it should not be left amended.

That is my objection.

The Court: The objection will be overruled, and an exception allowed.

Mr. Campbell: If the court please, in that connection, do I understand Your Honor's instruction was that simply

there is no proof on that portion of the allegation which was stricken, that is to say, to be approved by the Commissioner.

The Court: My view was that because of the peculiar formation of that paragraph by the Superintendent of Banks and the State Corporation Department could be deleted, and still the paragraph contains a charge proper in the indictment.

Mr. Campbell: Yes.

The Court: That therefore that was surplusage. If that couldn't have been, I would have stricken the whole paragraph.

Now, the objection made by Mr. Irwin, that same objection may be deemed to have been made by all defendants and overruled, and an exception allowed, because it is a proper point, and it should be saved."

[Assignment of Error I, R. 1051-1053; Bill of Exceptions, R. 927, 944-945]:

Said District Court erred in denying the motion made at the conclusion of the plaintiff's case, and renewed at the conclusion of all the evidence introduced in said cause, to direct a verdict of not guilty on the charge contained in count 1 of the Bill of Indictment herein.

The grounds of said motion, and the grounds of said error in denying said motion, were and are:

1. That the evidence introduced does not tend to prove that the defendant was guilty in manner and form as charged in said count, and is insufficient to support a verdict of guilty.

2. That the evidence is insufficient to establish the essential elements of the crime charged in that,

(a) that there is no substantial evidence, or any evidence, to show that the defendant, J. Howard Edgerton, or any of the other defendants, did depress and/or cause to be depressed, the market price of the securities of the First Security Deposit Corporation, as charged in the indictment, and that as a result thereof the defendants might or did acquire the same from the persons intended to be defrauded at prices greatly reduced from the particular value thereof, as charged in the indictment.

(b) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any other of the defendants herein, did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties thertofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California, as charged in the indictment.

(c) That there is no substantial evidence, or any evidence to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did convert and divert to their own use, benefit or profit, large sums of money, or any sums of money, or property, of the First Security Deposit Corporation, or of the persons intended to be defrauded, under the pretense of loans, or by any other means or method as charged in the indictment.

(d) There is no substantial evidence, or any evidence, to show that the defendant J. Howard Edgerton, or that any of the other defendants herein, did falsely represent or

pretend that the First Security Deposit Corporation was organized for the purpose of, and duly and actively engaged in the liquidation of the assets received by it from the Railway Mutual Building and Loan Association, and that pursuant to and under said false representation or pretense did convert said assets to their own use or benefit, as charged in the indictment.

[Assignment of Error XXIX, R. 1140-1172; Bill of Exceptions, R. 751-771, 773-794 and 919]:

Said District Court erred in overruling the objections and exceptions of the defendants and each of them, respectively, to Plaintiff's Exhibit 216 and admitting the same in evidence, in denying the motion of the defendant Edgerton at the conclusion of the plaintiff's case and renewed at the conclusion of all of the evidence in the case to strike said exhibit. The plaintiff's witness Webster testified that on July 9, 1940 Plaintiff's Exhibit 216 came into his possession from the inspector in charge at San Francisco, California; that he had a conversation with the defendant Twombly with respect to Plaintiff's Exhibit 216 on July 9, 1940; that the defendant Twombly stated that he had prepared Plaintiff's Exhibit 216 from memory and handed the same to Inspector Van Meter and that the information contained in said exhibit came to his attention while he was associated with the First Security Deposit Corporation and the Investment Finance Company. Prior to the receipt of said Plaintiff's Exhibit 216 in evidence, the following proceedings were had in the absence of the jury:

"Mr. Campbell: * * * Now, this document is offered, you might say, upon two bases; First, as admission

against interest on the part of the Defendant Twombly, and, second, to show his joining that scheme, or enterprise, and as to him the existence of a scheme or enterprise."

* * * * * * * * * *

"The Court: Now, I think it is only fair, in order that you may present the matter intelligently to the Court, to say that it involves, for the purpose of illustration (I have gone through it very hurriedly) all of the defendants and describes at some length, six pages, single spaced, the activities of this corporation. So that for the purpose of argument, you may consider that all of the defendants are involved."

"The Court: It is perfectly clear that such a document as this couldn't be considered to be properly introduced in evidence as against the other defendants, having been made subsequent to the termination of any possible connection which he had with the conspiracy, * * *"

"* * * it is conceded by the Government that Twombly severed his connection with both of these corporations about the 21st of December, 1938. Now, on July 9th, 1940, a year and a half after that, he made the statement to the postal inspector as to facts."

"Mr. Lawson: * * * when I thought or heard the rumor that there might be hostile defenses, I had Mr. Adams bring Mr. Twombly to my office. * * *

"and I canvassed this situation with him very carefully to find out—I am not saying that there are any hostile defenses—but to find out as to whether or not there were any hostile defenses.

We spent about three or three and a half hours in canvassing the case, and in all of its phases, and I was

assured from the beginning until the end that no statement had ever been made by Mr. Twombly, either in the form of a written statement, or any oral statement, that he had made any damaging or incriminating statements pertinent to my client, or any of the other defendants in the case. And I want to assure Your Honor that I went into that very thoroughly, and carefully.

I have no reason to believe that that statement contains anything contrary to the statements that were made to me at that time, and I can assure Your Honor that up until the time that this statement was presented I have always been of that mind."

"* * * if, assuming now that it does contain something contrary, as represented to me—it is a complete surprise. We have been collaborating all through the defense on the assumption that no statement has been made of a damaging character to my clients.

* * * * * * * * * *

Mr. Irwin: Why did we make all this inquiry at the outset?

Well, it is no secret that there was a very severe disagreement between Mr. Twombly and the others, and the break was not a pleasant one. It happened in '38, and prior to the time of this indictment they weren't even on speaking terms, so as lawyers, being advised of that, we were interested in finding out what had gone before, and that is why we started looking for those statements that might be made by a person in the heat of passion or who doesn't reason."

"The Court: * * * If they want to know what it is right now, we will have to read it out loud * * *."

(Thereupon said Plaintiff's Exhibit 216 was read into the record in the absence of the jury.)

"Mr. Campbell: If Your Honor please, my position in this matter is * * * the narration of these events by Mr. Twombly constitutes admissions on his part, first, as to his knowledge of those events at the time they occurred, * * *, secondly, that he had knowledge of the existence of a scheme to defraud, * * * and that he knowingly joined in that scheme * * *

Mr. Lawson: What I would like to know, Your Honor, the question of knowledge wherein does that document show that Twombly had that knowledge during the existence of the conspiracy. I don't see it."

* * * * * * * * * *

"Mr. Irwin: In the event Your Honor rules that this statement may be received as to the defendant Twombly only I believe that a motion for a severance should be made on the following grounds:

The Court: You make this motion now applicable to the time it is admitted?

Mr. Irwin: * * * I respectfully move * * * for a severance from this trial on the following grounds: That the evidence contained in Plaintiff's Exhibit 216, though it is competent or might be competent as against the defendant Twombly, is incompetent, hearsay, and prejudicial to the rights of the (other) defendants * * * and that its admission deprives the defendants of a fair and impartial trial to such an extent that no admonition to the jury would remove the prejudice created by the reception of that exhibit * * * in evidence. * * * When I was retained in the case, I was advised and told by my

clients that they didn't trust Mr. Twombly, that they didn't want to cooperate with him in connection with the trial because there had been considerable friction and considerable hard feelings, and that he had been discharged from the company under very unhappy circumstances, they didn't wish to collaborate or to cooperate, and to watch him That, in effect, was the admonition.

As we got into the investigation of this case, word was sent to Mr. Edgerton by mutual friends of Mr. Twombly, that his attorneys should certainly cooperate with him and that there was no hard feelings, what is gone is gone, and everybody was in the same boat, and that he wanted to get together. * * *"

"* * * We understood that Twombly had been assisting the post office inspectors in the investigation of the case. * * * We understood that there was prejudice and hard feeling— * * * but what we wanted to know before we considered any collaboration and likewise whether or not we should consider a motion for severance which had to be supported by affidavits—was whether or not Mr. Twombly had made any written statement of any kind to the post office inspectors * * * which would implicate or involve or cast discredit and which might be admissible in evidence in this lawsuit.

* * * Mr. Adams told me, not once but on several occasions, that he had interrogated Mr. Twombly * * * and that Mr. Twombly had assured him that there wasn't any, and that he, Mr. Adams, * * * was satisfied that Twombly, in fact, had made no statement. Twombly told me he had made no statement as late as yesterday afternoon * * * He said 'You won't find a thing damaging

to your clients in that statement.' * * * If we had made a motion for a severance before the trial started, after the inquiry and the research we made, we would have had no grounds. We couldn't have made any affidavit * * * There was an antagonistic defense * * * there was nothing which would have justified a motion for severance before this jury was impanelled, we could have made no showing to the court."

* * * * * * * * * *

"I believe it is very persuasive that this statement of itself indicates that the defenses, and that are now for the first time known to us, is clearly hostile and clearly antagonistic.

"Now, as to the prejudicial nature, may it please the Court, even though it is restricted as to the Defendant Twombly, I will ask Your Honor's consideration of this fact: Would Your Honor say that in our duty to our clients, that even though Your Honor restricts this statement to the Defendant Twombly, that we could go on and present the defense in this case, which would ignore, before the jury, the accusations and charges made by the defendant Twombly?

The question suggests its own answer.

For example, Your Honor, we would have the burden of showing that in the fore part of that statement, Mr. Twombly leaves out that Mr. Edgerton had nothing to do with it; that Haight and Trippet were the attorneys who organized that, and that H. F. Dunton, the man who outlined the plan, had just recently resigned as Deputy Building and Loan Commissioner.

We would have the burden of showing that Mr. Twombly initiated the Pierce Petroleum loans and initiated the dog food plan.

I say to Your Honor, as opposed to the question of the prejudicial nature, I think it suggests its own answer. * * * This matter before us, * * * isn't an admission; that is a complaint that this man initiated it. * * * Now it appears for the first time that is why we are here. * * * What it amounts to. * * * is a second indictment we have to meet. It includes charges, * * * that are not contained in this indictment."

"Mr. Lawson: Your Honor, might it be considered that the same motion that was stated by Mr. Irwin, that it may be made on and in behalf of the Defendants Edgerton and Ireland and on the grounds therein stated, that prejudice will result in the trial of Edgerton and Ireland, and of such character that no instruction or limitation by the Court as to proof will cure the prejudice; and as a result they will not have a fair and impartial trial.

The Court: It may be stipulated that the same motion may be deemed to be made as to those defendants.

Mr. Campbell: So stipulated.

* * * * * * * * * *

Mr. Lawson: The vice in this situation is this: That the statement, as made by Mr. Twombly, is, in the form of an accusation, or a complaint against the defendants, and particularly as to the defendant Edgerton. Ninety per cent of that statement is a *strieture* against Edgerton in so many words; in so many words it says that he is

guilty of this, that, and the other thing, stating a long series of conclusions, not a statement of fact.

Presuming for the moment that up until the time of the trial that everything was done properly; that is, a proper course of conduct was taken by counsel in regard to the protecting of the right of the client, which I am satisfied was, and I might say, incidentally, there, that I am familiar with the rule that ordinarily a motion for severance is not granted. * * * I wouldn't make that motion unless * * * I had * * * strong reasons to support my application, otherwise, we would be merely making a frivolous motion."

"Here is the situation that we find ourselves in: As I stated to Your Honor yesterday, that having heard statements of a character that Twombly may have said something derogatory about the Defendant Edgerton, I believe I discussed this with Mr. Campbell and Mr. Campbell said in a jocular vein, said, 'Well, what we have on Twombly,' and so forth. I think that is a correct statement. I think in the same vein I asked him what it was, and he said, 'You will hear about that later.' "

* * * * * * * * * *

"Mr. Lawson: I went into the matter first with Mr. Adams and discussed it with him, and then I suggested that Mr. Twombly come to my office, and Mr. Adams and Mr. Twombly came to my office * * * I took my gloves right off and put it in a very blunt form of question, and told him exactly what I had been informed, and that I wanted to know * * * if he had made (a) statement. * * * Now, Mr. Twombly, * * * I learned * * * during our discussion that evening, is not only a lawyer, but he is an accountant. * * *

He not only kept the books, but he made the audits. * * * Now, when we discussed it that evening, * * * after I was assured that * * * no damaging statement had been made, and that he would fully cooperate, I said, 'You are just the man to take care of that period, because of your particular knowledge and skill, and on all questions relating to that period we are going to look to you to take care of.' That was the understanding we had, and I relied upon it all through the preparation of the case and during the trial of the case.

* * * * * * * * * *

The Court: Now, let me ask you just one question: Suppose that Mr. Twombly had said to you yesterday 'Gentlemen, whether you like it or not, I have made up my mind that I am going on the stand, and I am going to answer every question that anybody asks me about this matter;' would you be in any different position?

* * * * * * * * *

Mr. Irwin: * * * The defendant can take the stand and have the opportunity of cross-examination. It comes for the first time, and he puts in his direct testimony, and it must be evidence and not conclusions. You have an opportunity to object to every question as he goes along, and he is confined to legal competent evidence. Now, this statement contained all kinds of conclusions.

* * * If he took the stand he would not be able to state that Starr, Smale and Thomas violated their trust, the trust of those depositors, because that is hearsay, clearly as to him. There is nothing in the books. Plaintiff's counsel hasn't shown a thing that Starr, Smale and Thomas violated their duties, that they had been running

around indiscriminately getting the security holders signed up.

All that stuff that he refers to in '31, '32, and '33, the most damaging kind of things, Your Honor, which are the rankest hearsay on his part, because he doesn't come in until '34.

I think those are two points upon which Your Honor's hypothesis may be distinguished.

Again, in that connection, his manner on the stand, the usual instruction that the jury has, our cross-examination proving the falsity of his statements, providing we can, would be checked and counter checked by a restriction, so that we got only competent evidence; and that the full story would be there at one time instead of going in this way that the burden is upon the defendants of taking something, which is not admitted as against them, and cannot be received as against them, and refuting the whole thing in addition to what is in the indictment."

"The Court: * * * I have made up my mind that my ruling will be that there will be no severance * * * I shall be willing to receive and permit them to file * * * any affidavits that they may want * * *.

Mr. Irwin: * * * Might I ask Your Honor whether this wouldn't eliminate unduly encumbering the record * * * if Mr. Lawson and I were permitted to be sworn * * * and then state that the statement given * * * is true in all respects, to the best of our knowledge, * * *. Therefore that that would be in effect our testimony without encumbering this record with affidavits?

The Court: I am perfectly willing to have you, in lieu of affidavits."

Thereupon, J. J. Irwin and Gordon Lawson having been first duly sworn were examined and testified as follows:

"The Court: Was the statement that you made this morning true as to the facts which you gave in connection with the motion for severance, Mr. Irwin?

Mr. Irwin: It was, Your Honor; in substance, each and every one of the facts related are my recollection.

The Court: So far as you know at the present time, there are no corrections or errors in that statement of facts?

Mr. Irwin: That is correct.

The Court: In so far as the statements purported to indicate any knowledge on your part or any contact on your part, was it true?

Mr. Lawson: True, Your Honor.

The Court: You have no correction to make?

Mr. Lawson: No corrections."

"Mr. Irwin: So it may be preserved, may it be stipulated that the motion has been made and that it is denied and exception is granted?

The Court: Yes.

Mr. Irwin: There is this other motion to-wit, the motion is now made, may it please the Court, on behalf of the defendants Starr, Smale and Thomas, individually, for themselves, that this Honorable Court withdraw a juror and thereupon declare a mistrial because of the introduction and the receipt of Exhibit 216? That is to complete the transaction.

The Court: The same motion as to your client?

Mr. Lawson: Yes, on behalf of the defendants Edgerton and Ireland.

The Court: The motion will be denied, exception.

Mr. Irwin: May it be considered, Your Honor, that these motions were made in a proper sequence following the receipt of 216, and I think this point should be raised, Your Honor.

The Court: Just a minute. May it be so stipulated that the motions may be deemed to be made in their proper sequence?

Mr. Campbell: So stipulated.

Mr. Irwin: Your Honor, in this connection, with reference to 216, there has never been any formal objection stated on behalf of the defendants; in other words, Your Honor was good enough to consider a motion for severance on the assumption that it was in evidence, so whenever Your Honor thinks it is appropriate, and while the jury isn't present, I think the objection should be made.

The Court: Make it right now because I am going to bring the jury down.

* * * * * * * * *

Mr. Irwin: Your Honor, objection is made to the reception of Exhibit 216 for identification, specifically and individually, on behalf of the defendants Starr, Thomas and Smale on the grounds that although the offer is limited to the defendant Twombly and the evidentiary matter contained in that exhibit is incompetent as against the defendants Starr, Smale and Thomas, and cannot be received against them, that nevertheless its being received

only towards Twombly, that the nature of the exhibit is so prejudicial to the rights of the several defendants that I have mentioned and it deprives them of a fair and impartial trial to such an extent that no admonition to the jury can or would remove the prejudice created by the reception of that document.

I think I have covered the grounds. Thank you, Your Honor.

Mr. Lawson: I want to join in that objection, Your Honor, and add to it, on behalf of the defendants Ireland and Edgerton, that there is no evidence in the case that connects up either of the defendants Edgerton or Ireland with the scheme or conspiracy, as alleged in the indictment, and that this is an attempt by indirection to make a connection between those defendants with the scheme and conspiracy as alleged.

* * * * * * * * *

Mr. Irwin: Your Honor, I think I should add that the statement in addition is prejudicial because it contains matters which are not contained in the issues of the indictment, and that it includes matters which are clearly only hearsay as to the defendant Twombly and could not be binding on the defendant I represent.

Mr. Lawson: I wish to adopt that and add to it that it touches on matters that have already been limited to a point, that this statement goes beyond that limitation. As a matter of fact, that it admits evidence that the Court has already ruled to be objectionable.

The Court: The objection will be overruled.

The rule of the Court is that that limitation does not apply to the offer, as limited, or are the objections sound

under the offer as limited, to not only the defendant Twombly but as to the intent of the defendant Twombly." (To which ruling of the court, an exception was duly taken.)

(Thereupon said statement was received in evidence and marked Plaintiff's Exhibit 216.)

"The Court: Gentlemen of the jury, we have here admitted in evidence a document which will now be read to you by counsel for the plaintiff, the document having been admitted for a very limited purpose. * * *

Now I might think that John Doe and Richard Roe and Bill Smith and Mary Grab were the dirtiest bunch of crooks in the world, and I might take an action predicated upon that feeling. It might not be true at all. And what I thought about these people might be no evidence at all as to what they actually were, or as to what I thought had occurred.

We describe this as a narration, as a narrative of what has happened in the past. Now that document isn't evidence which you may properly consider in any way, shape, or manner, as against any defendant in this court room, including the Defendant Twombly, except to show his intent in connection with the crimes charged. It is expressly limited to that.

To illustrate: Whether or not those things were true or false would be immaterial so long as the Defendant Twombly thought they were true. If, thinking they were true, he did certain things, then they are admissible to show his intent under certain circumstances."

Thereupon said Exhibit 216 was read to the jury. Said exhibit is in words and figures following:

"(In ink) Prepared by Mr. Twombly.

'The first Security Deposit Corporation was organized in 1931 for the purpose of reorganizing the Railway Mutual Building and Loan Association. The latter company was rendered non-operative because of the building and loan situation existing at that time, together with the check on operations because of the more stringent building and loan laws as compared with the regulation of general corporations.

To effect the transfer of securities and assets of the Railway Mutual Building and Loan Association it was necessary to procure the consents of its security holders. For this purpose an extremely complicated Plan and Agreement was adopted whereby the said holders were to deposit their securities and receive in exchange therefor interim certificates. R. W. Starr, E. C. Thomas and L. S. Edwards were appointed as trustees and managers under the said plan. High pressure salesmen were then sent out to contact the securities holders for the purpose of procuring their consents to the proposed plan of reorganization. These holders were apparently promised and told anything and everything in order to obtain their consents. Those who consented easily got either what they were supposed to be entitled to in securities of the new company, or less. Those who were not so easily sold on the idea in many instances were given preferential securities. No plan of exchange of securities was consistently followed. The so-called Plan and Agreement was so long and so complicated that it was apparently un-

derstood by nobody, however, there is no doubt but that the trustees were extremely derelict in their duties.

After the expenditure of approximately $60,000 of those investors' money, it was then determined that there was no law which would permit of the reorganization. Lobbyists were then put to work to procure the passing of enabling legislation by the Legislature of the State of California. This was ultimately accomplished. Until approximately this time the affairs had been dominated and controlled by R. W. Starr, E. C. Thomas and J. L. Smale, and at this time J. H. Edgerton, an attorney, was added. It was still impossible to complete the reorganization because an insufficient number of consents had been obtained. To put the deal over a deal was made with Charles E. Kenner (a graduate of Sing Sing prison for the misuse of other people's money and now in Folsom penitentiary for the same reason). Kenner was to obtain sufficient additional securities or consents to make the plan operative and was to receive approximately $40,000.00 in good first trust deeds for which he had the option of trading Railway Mutual Building and Loan Securities or securities in the First Security Deposit Corporation face value for face value. At this time these securities were quoted at about 20 cents on the dollar The transac-.tions and all motions clearly show that any realization or acceptance of fiduciary relationship, between these dominating personages and these they purported to represent, was entirely lacking. Such a condition has continued throughout. Not only this, but the history of this set-up reflects that every strong personality connected with these companies who attempted to work for the interests of the investors was ousted.

The reorganization was finally completed with approximately 20% of the investors staying in the Railway Mutual Building and Loan Association and about 80% high pressured into the First Security Deposit Corporation. The basis of the financial structure of the First Security Deposit Corporation was three classes of stock, and a great many varieties of collateral trust bonds. The First Security was to take 80% of Railway Mutual Building and Loan Association assets and liabilities and the balance was to remain. The same amount of securities in the Railway Mutual Building and Loan Association were to be turned back to them for cancellation. The Building and Loan Commissioner of the State of California designated the segregation of assets, and the best 20% remained in the Railway.

The First Security Deposit Corporation issued bonds in the sum of approximately $1,300,000, preferred stock (A and B) in the amount of $274,460, and common stock in the amount of $4,488. Of the latter stock Starr, Thomas and Smale controlled about $3,350, and this was the voting stock. In this way control was carried on and $3,350 controlled this $1,600,000 corporation for a period of two years. At this time, inasmuch as no dividends had been paid on the preferred stock, the preferred stock became the sole voting stock. However, this made no difference as at the time of issuance of the securities every investor was requested to execute a signature card. Some refused but the huge majority complied. On the reverse side of this signature card there was printed the following, "Proxy, I hereby appoint R. W. Starr, J. H. Smale, and E. C. Thomas, or any two of them acting in accord as my proxy to vote my shares at all meetings at which I am not present or have a subsequent proxy, for a

period of seven years unless revoked earlier. No statement or condition, verbal or written, other than herein provided shall be binding on the corporation."

No notice of any stockholder's meeting was ever given other than by publication in The Daily Journal, a Los Angeles legal newspaper, and which is not read by the public at large. Therefore, for all practical purposes, the control of the corporation remained unchanged.

The assets in the segregation were finally transferred effective as of January 1, 1934. The Board of Directors of the First Security Deposit Corporation consisted of R. W. Starr, E. C. Thomas, W. S. Brayton, A. R. Ireland, C. E. Perkins and Wm. Leffert and C. H. Berry. Berry and Perkins have subsequently resigned and Brayton has died. J. H. Edgerton was attorney. J. L. Smale remained in the Railway Mutual Building and Loan Association as president.

About this time a first trust deed held on the Reed Bros. Mortuary for approximately $42,000 was in considerable trouble. Mr. Edgerton formed the R. F. D. Discount Co. (at first a partnership and later a corporation) which was conducted and operated in his office. The interested parties were Edgerton, Starr, Smale, Thomas, Berry, Leffert, Brayton, Ireland, also Aaron Johnson and Florence Anderson who were with the Railway Mutual Building and Loan Association. The R. F. D. Discount Company purported to act as go between in the settlement of this trust deed. Reed Brothers paid $22,000 in cash into an escrow at the Title Insurance and Trust Company, $17,800 of this sum was paid to the First Security Deposit Corporation in settlement of all liability under the trust deed. Edgerton retained $1,000 as attor-

ney's fee. R. F. D. Discount Company got $3,200 for which each of the ten persons received a $320 interest in the R. F. D. Discount Company. The only item showing on the records of the First Security Deposit Corporation is the receipt of the $17,800. No attorney's fee to Edgerton is shown and not approval therefor was ever given by the First Security Deposit Corporation officially.

Early in 1934, a deal was made with Battell-Dwyer Company (a stock and bond concern). They were to have the exclusive right to buy securities of the First Security Deposit Corporation and were to be paid 5 points above what they paid upon delivery of the securities to the First Security Deposit Corporation. On many occasions it appeared they took more than five points, but nothing was done about it. Any sort of story or procedure was used to jockey the investors in the First Security Deposit Corporation out of their securities. The original price paid was in the neighborhood of 20 cents on the dollar for the bonds, and much stock was procured free on the representation that it was without value.

Included in the assets of the First Security Deposit Corporation was a house on Stearne Drive, Los Angeles, California, and was carried on its books at approximately $7,500. Edgerton, in 1934, decided to buy the house. The First Security Deposit Corporation had acquired some of its own bonds, so Edgerton bought $7,155.06 face value. These had been bought for $2,206.64. Edgerton had these bonds deposited in an escrow where payment was to be made. In the same escrow, he had the papers transferring ownership of the real property deposited. In the escrow he borrowed apporximately $2,300 on the real property from the State Mutual Building and

Loan Association. With this money he paid for the bonds and the costs of the escrow. The bonds were then returned out of the escrow to the First Security Deposit Corporation in payment of the property. The balance of $2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in payment of the property. The balance of $2,021.29 remaining in the escrow was paid over to the First Security Deposit Corporation in full payment for the bonds, or a cash loss on the bond deal alone of $185.35. Approximately one year later, the First Security Deposit Corporation took back another piece of property located at 239 21st Place, Santa Monica, California. Edgerton bought this property. He sold the Stearne Drive house for about $4,500.00 cash. From Battelly-Dwyer and other sources, he purchased bonds of the First Security Deposit Corporation of a face value of $11,750. The price paid was between 30 and 40 cents on the dollar. These bonds, together with the cash sum of $110.44 was given by Edgerton to the First Security Deposit Corporation for the property. This resulted in a book loss on the property of $372.72. The actual cash loss to investors of the First Security Deposit Corporation on these two deals is about $7,000.00.

In the summer of 1934, auditors in checking bond purchases by the First Security Deposit Corporation from Battelly-Dwyer Company discovered that on approximately 1,000 shares of First Security Deposit Corporation preferred stock $1.00 per share was added to the price charged for bonds and paid by the First Security Deposit Corporation, and the stock was delivered to Edgerton and Starr for the R. F. D. Discount Company. Battelly-Dwyer Company refunded this money to the First Security Deposit Corporation and rearranged their deal with

the R. F. D. Discount Company. R. F. D. Discount Company had now become the medium for acquiring all the stock it could of First Security Deposit Corporation. Practically its entire working capital consisted of the $32,00 hereinbefore described. This stock carried voting control, and all of it would become very valuable if the bond holders could be chased out of the picture cheaply enough.

About this time Kenner decided he could use the Railway Mutual Building and Loan Association in some of his manipulations. He approached Edgerton for the purpose of purchasing about $19,000 face value of securities which the First Security Deposit Corporation owned in the Railway Mutual Building and Loan Association and had much to do with its control. It was arranged that the R. F. D. Discount Company would trade the same par value of First Security Deposit Corporation stock to the First Security for its securities in the Railway. This was done, although all holders of First Security Deposit Corporation stock were being assured by Battelle-Dwyer Company that it was worthless. Kenner then paid $1,000 to R. F. D. Discount Company for an option to purchase the Railway securities. He didn't take up the option and forfeited his money. However, the Railway (with some assistance through the use of First Security money in purchase of securities to get the necessary consents) subsequently became federalized and these securities were redeemable for 100 cents on the dollar. Sometime later P. S. Noon needed money in mining operations. He approached Edgerton and it looked like a very lucrative deal to him. He and four or five others made a deal (involving bonus, etc.) with Noon to procure the money for him. It appears that they borrowed about

$15,000 worth of the Railway Mutual Building and Loan Association securities from the R. F. D. Discount Company and hypothecated their stock in the R. F. D. Discount Company to the R. F. D. Discount Company for the return thereof. Edgerton then hypothecated the Railway Building and Loan Association securities to F. E. Jones borrowing money from him which was loaned to Noon. The mining deal failed to come up to Noon's expectations and he is now endeavoring to pay off. Another ramification will be described later. Noon is apparently 100% honest, being a court reporter of excellent reputation.

In October, 1934, Edgerton had caused the formation of the State Investors Corporation, consisting of his father and one J. L. McSwiggen (a former employee of the First Security Deposit Corporation), State Investors Corporation was entirely devoid of any financial backing, yet in October, 1934, the Board of Directors of the First Security Deposit Corporation agreed to enter into a contract whereby it would sell $187,020.93 book value of designated real property to the State Investors Corporation. The State Investors Corporation took immediate possession of the properties and was entitled to receive all rents. It had no obligation to make any payments, other than for taxes, for one year. It could pay for any individual piece of property by delivering face value of First Security Deposit Corporation bonds for book value of the property, or could pay in cash at the rate of 40 cents in cash for each $1.00 of book value. This arrangement was so entirely bad and unsatisfactory to the First Security Deposit Corporation that the contract was cancelled by mutual consent after about six months.

Dar Knowled, son-in-law of J. L. Smale, purchased a property from the First Security Deposit Corporation for about $1,000 cash. He immediately borrowed an amount from the State Mutual Building and Loan Association sufficient to return the $1,000 and buy furnishings for the house. It is believed that the property was subsequently sold at a handsome profit. Some such deal was also made with another relative (father or father-in-law) of J. L. Smale.

Through the efforts of Battelle-Dwyer Company and others approximately $700,000 worth (face value) of bonds of the First Security Deposit Corporation were acquired and retired, up to the time Battelle-Dwyer Company became more or less inactive in the field. It was an extremely lucrative deal to them, a great deal of the bonds having been acquired through the trading of other securities therefor.

In 1935, the Investment Finance Company was organized and operated in conjunction and out of the same office with the First Security Deposit Corporation. Its original capitalization was exceedingly small, the First Security Deposit Corporation being the main holder of stock with the purchase of $1,000. This it still holds. Subsequently all of the R. F. D. Discount Company holdings were sold to the Investment Finance Company and the proceeds distributed and the corporation was dissolved. This included the Railway Mutual Building and Loan Association securities which had been pledged. In order to cover this item these same individuals hypothecated their holdings in the Investment Finance Company (which they had acquired by purchasing stock in the Investment Finance Company, with the money received from the sale

of R. F. D. Discount Company assets to the Investment Finance Company). Stock was put up as follows: Starr 2500 dollars, Mary Starr Brayton (widow of W. S Brayton) 5000 dollars, Ireland 5000 dollars, Edgerton 1666 dollars, Anderson 1200 dollars, Thomas 1160 dollars. Some of the R. F. D. Discount Company holders did not put their entire receipts into the Investment Finance Company.

The Investment Finance Company has financed its operations by borrowing from the First Security Deposit Corporation. At the present time Investment Finance Company owes First Security Deposit Corporation about $275,000 which it has borrowed on an open account not even giving notes therefor.

The Investment Finance Company has engaged in many activities most of which have resulted in frozen assets. A loss of about $25,000 was had on an oil well deal with Kenner. This deal was consummated by Edgerton. Considerable losses were obtained in the automobile business, one deal being the backing of Kenner. Deals with Kenner have cost about $75,000.

The Investment Finance Company took over the purchase of First Security Deposit Corporation securities. It borrowed money from First Security Deposit Corporation and purchases its securities from its investors. The bonds it purchased below face value are either still held or have been turned over to the First Security Deposit Corporation at full value (including accrued interest). The stock it purchased was kept and held for purposes of control of the First Security Deposit Corporation. Letters were written to First Security Deposit Corporation investors telling them First Security Deposit Corporation

was in liquidation, and so forth. One C. L. Cronk was employed for this purpose. This was over the opposition of at least one director who stated he believed the writing of such letters was contrary to the Federal Securities Act, and also was possibly using the mails to defraud. No attention was paid to this except that a committee was appointed to handle the matter and consisted of Starr, Thomas and Cronk. Later Edgerton superseded Thomas. Edgerton finally decided that no letters should be written out of the State of California. The Investment Finance Company through this procedure, and through the R. F. D. Discount Company purchase, has acquired about $100,000 par value of First Security Deposit Corporation preferred stock and about three-fourths of the common stock.

Edgerton became interested in the Western Brick Company and caused the Investment Finance Company to invest about $30,000 therein, besides loans by the American National Bank of Santa Monica. He, Starr and Thomas, acquired some free stock for themselves in the transaction. This company was revamped and the assets were sold to the Pacific Brick Company, thereby freezing out minority stockholders in the Western Brick Company. The company has operated at a loss since acquisition.

Edgerton, with Battelle-Dwyer Company, then presented a deal involving the American National Bank of Santa Monica to the Investment Finance Company. The bank had a capitalization of $100,000 and a purported surplus of about $22,000. Assets listed consisted partially of a building valued at $84,000 and furniture and fixtures valued at $17,000, both actually worth not more than $50,000, giving a real approximate value of $71.00 per

share. The Investment Finance Company purchased 100 shares at $150.00 per share and loaned Battelle-Dwyer Company $150.00 per share on 167 additional shares. The balance necessary to constitute control of the bank was sold to clients of Battelle-Dwyer Company after a voting trust had been formed wherein Edgerton and Dwyer were voting trustees. Battelle-Dwyer Company was unable to pay the loan, going out of business, and the Investment Finance took over the stock. The Investment Finance Company now has about $54,000 invested in stock of the bank, and it does not seem possible that any dividends can be paid for several years. One director of the Investment Finance Company went on the bank board and stayed about two months. He claimed something was wrong somewhere in the set-up, including the management of the bank, and should be thoroughly gone over. Edgerton and Starr decided Starr should go on in the fault finder's place to represent the Investment Finance Company on the bank board. Six months later, after much unnecessary money had been spent by the bank, the management of the bank was changed. About two years later the bank examiners found that the building had been written up from $1.00 to the value shown on the balance sheet and cash dividends paid on the surplus accruing from the write-up. This happened shortly prior to the advent of the Investment Finance Company into the picture. It is now necessary that additional funds be put into the bank to rearrange the capital structure to clear up the capital impairment that exists. Edgerton and Starr are now directors on the bank board.

In connection with the bank, another corporation was formed, the American Building and Investment Com-

pany. This operates in conjunction with the bank being used as a spring board. Investment Finance Company has invested about $20,000 in this venture which has not as yet shown any huge profits.

One W. P. Bonds next came along and sold Arnold Eddy (associated with Edgerton in the California Federal Savings and Loan Association) and Edgerton on the dog food business. The Investment Finance Company decided to go for the deal. When building was discussed only one individual wanted to build on a strict contract basis. Instead it was a cost plus job and cost many times the original contemplated price. Approximately $60,000 has been invested in this venture.

None of these ventures has made any profits and the possibilities of ever making any are exceedingly remote.

This frenzied finance and extreme mismanagement results in a loss to the investors in First Security Deposit Corporation between $300,000-$400,000.

Edgerton is attorney for all of these companies and actually runs them. He is manager of the First Security Deposit Corporation, Investment Finance Company and the California Federal Savings and Loan Association. Attorneys fees paid by the Investment Finance Company and the First Security Deposit Corporation (prior to the time Edgerton became manager) for the period January 1, 1934, to April 1, 1938, were about $15,000. $5,000 would be excessive.

In order to qualify Miller, Hollowell, Starr and Edgerton as directors of the American National Bank, it was necessary that they have stock in the par value $1,000 and execute affidavits that this stock belonged to them

free and clear and was unhypothecated in any way. The Investment Finance Company delivered to each of them the necessary stock and took from them promissory notes in the sum of $1,500 (the amount paid for it by the Investment Finance Company). There was no intent on the part of any of them to pay for the stock. Edgerton's and Starr's stock is held in the office of the Investment Finance Company assigned in blank by virtue of a separated assignment attached to the stock for easy removal in case of inspection. The same is true of Miller and Hollowell except that it is held in a safe deposit box in the bank. There is a gentlemen's agreement that no effort will be made to collect the notes. This is merely a subterfuge to get around the requirements of the government.' "

The grounds of said error in overruling said objections of the defendant Edgerton to Plaintiff's Exhibit 216 and in denying his motion to strike said exhibit were and are the grounds of his objections hereinabove stated.

[Assignment of Error XXV, R. 1091-1098; Bill of Exceptions, R. 615-617, 619-627, 916 and 921-922]:

XXV.

Said District Court erred in admitting into evidence over the objections and exceptions of the defendant Plaintiff's Exhibit 46 in full for the purpose of showing that the information contained in said exhibit was communicated "To certain individuals" in order that the jury "may use that as an element to determine the intent with which the various acts were done" by the various defendants, and in denying the motion of the defendants made at the close of the plaintiff's case and at the close of all of the

evidence in the case, to strike said exhibit and exclude the same from consideration by the jury; and in overruling defendant's objections to and in denying his motion to exclude that portion of said Exhibit 46, which contains the comments, opinions and conclusions of the author of said exhibit, as distinguished from the audit contained therein, from the consideration of the jury.

Said Exhibit 46 consists of a letter and an accompanying report by certified public accountant under date of February 25, 1939, to the Investment Finance Company respecting the examination of the accounts of said company, as of December 31, 1938; said report recites as follows:

"Comments.

Cash.

Cash on hand was counted and reconciled to December 31, 1938, and the bank accounts were confirmed by letter and found in order.

Accounts Receivable.

The accounts receivable are presented in detail in Schedule I and total $2,038.69, consisting largely of insurance premiums uncollected by the Wilshire Insurance Agency.

Contracts Receivable.

Contracts receivable as per Schedule II are automobile sales contracts. They are presented on Exhibit A at book value, although more than 50% of the dollar balance at December 31, 1938 have been pledged with the American National Bank of Santa Monica as security for a loan which at that date amounted to $8,700.00.

Notes and Loans Receivable.

Of a total of $48,413.27 in notes and loans listed in Schedule III, $37,400.00 is unsecured. In fact, the largest single note of $16,650.00 is signed by Battelle-Dwyer & Co., which, it is understood is no longer in existence.

Investments.

Schedule IV is a presentation of the securities into which the company has put most of its funds, obviously more for purposes of control of the various companies concerned than for income from the securities themselves. Most of the investments have been in the common stocks (or voting stocks) of the various companies upon which little or no dividend income has yet been realized.

Pledge Agreement—California Federal Savings & Loan Securities

The item of securities owned in the California Federal Savings and Loan Association which is carried at $15,000.00 is subject to a pledge agreement of the liquidated Consolidated Investors Corp. with one F. E. Jones, and is secured by the deposit with this company of the following shares of stock in this company.

W. S. Brayton (has not been assigned to Investment Finance)	5,000 shares
R. W. Starr	2,500 shares
A. R. Ireland	5,000 shares
J. H. Edgerton	1,666 shares
F. A. Anderson	1,200 shares
Ed C. Thomas	1,160 shares
Total shares Hypothecated	16,526 shares

The above listed individuals are all the endorsers of the said pledge agreement. This agreement apparently was originally intended to terminate on July 23, 1939, but it should be noted that there was a typographical error on the agreement itself so that it actually reads July 23, 1936.

Deed of Trust—Pacific Brick Co.

Interest has been accrued to August 1, 1938 on a first trust deed on all the property of the Pacific Brick Co., which was the approximate date of acquisition by this company.

Real Estate.

The real estate shown on Exhibit A at $5,608.19 consists of a house built for resale. It is mortgaged to the extent of $3,673.18 as shown under First Trust Deed Payable.

Accounts Payable—First Security Deposit Corporation

This account has gradually been built up to its present figure over the past three years by numerous advances from First Security Deposit Corporation on open account without security. Interest has been paid at the rate of 3 per cent per annum, but this interest has been paid in bonds of the First Security Deposit Corporation at face value, thus reducing the effective interest rate because all such bonds purchased by this company have been acquired at a substantial discount.

Inter-locking Schedules.

Schedules V and VI, respectively, show the inter-locking stockholders and directors of the eight related companies. Schedule V is presented on transparent paper so

that the two charts may be considered either jointly or separately. Only those stockholders or directors are included on the charts who are connected with two or more of the companies involved.

Schedule VII presents inter-company financial *objections* with amounts. The broken lines indicate unsecured obligations and the solid lines indicate obligations which are either fully or partially secured.

General.

With reference to the 'Noon deal' mentioned on page 2 of comments, no attempt was made to verify the present status of the note or pledge agreement. It would appear to be a doubtful asset at best. It is also possible that the manner of showing the account as Savings and Loan is questionable since probably all the Investment Finance obtained was an agreement or contract rather than the shares themselves.

Possibly the matter of most importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co. is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlocked as to appear identical in effect (see Schedules V, VI and VII); (2) profits which might accrue to the First Security Deposit Corporation would be

diverted to the narrower limits of the fewer shareholders of the Investment Finance Co., to the loss of shareholders in the former company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation.

These questions, then, should be answered, and do they constitute fraud:

(a) The purchase of First Security Deposit Corporation bonds at a discount, and the resale of these securities to that company at par, including accrued interest, retaining the profits in Investment Finance when, in practically no instance, had the First Security Deposit ever paid face value to others?

(b) Taking over the Wilshire Insurance Agency, and diverting commissions formerly earned by the First Security Deposit into the income of the Investment Finance?

In addition to these questions there might be raised the more general one of whether, since in acquiring funds from Security—which funds were in most instances profitably invested—the re-investment in such mismanaged enterprises as Bonds-17, for example, might on its face be construed to be fraud and mismanagement regardless of the answers to the hypothetical questions propounded above.

It would also appear that perhaps in some instances letters sent out by Mr. Cronk might be criticized as being misstatements of fact, and still further, might bring the company under the S.E.C. because they were sent through the mails out of the state.

In summarizing, it would appear that it might be difficult to justify legally, the existence of the company in

any particular, as it is now operating. As your auditor, I wish merely to direct the above matters to your attention, realizing that you have no doubt considered them before."

The grounds of said objections and motions to exclude were:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters in agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant; for the reasons,

(1) The same has no tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues, raised by the indictment;

(2) That there is no evidence that the defendant Edgerton had knowledge of said report, and that portions of Exhibit 46, as distinguished from the audit itself, are mere comments, opinions and conclusions by the author of said report, and hearsay.

5. During the course of the reading of said exhibit to the jury, the Court made the following comment:

"The Court: * * * This is being introduced, as I understand the position of the plaintiff, to show that this information was communicated to certain individuals. * * * In order that you may use that as an element to determine the intent with which the various acts were done by these various defendants."

At the conclusion of said reading to the jury, the Court made the following statement:

"Now, gentlemen, I again want to caution you that you are not to consider that audit report (or the minutes) for the truth or falsity of what they contain other than the showing that is indicated, the minutes, that this document was discussed. It has been introduced and been accepted only to show the intent or as one of the elements of intent together with other things that may be introduced during the course of the trial, and you are to keep your mind open even on that element."

[Assignment of Error XXVI, R. 1098-1108; Bill of Exceptions, R. 953-960]:

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

"Mr. Campbell: Mr. Lawson also referred to this statement of Mr. Campbell's (Plaintiff's Exhibit 46) and in his reference to it he says this: 'There is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, you will recall the instruction of the Court, and you will recall the limitation placed on this document, that the document itself is not to be considered by you as proving or disproving any of the facts or statements—strike out the 'facts'—any of the statements contained herein. It is not to be considered by you for that purpose.

But let's test out Mr. Lawson's statement, that there is no evidence in the case, no evidence elsewhere to support the charges that are made in this document. I think we are entitled to do that.

Now, let's see, Mr. Dean Campbell starts out to say here, and he propounds certain questions—

Mr. Lawson (Interrupting): Your Honor, and Mr. Campbell, I don't have a copy of my argument, but I think, Your Honor, that I did make that first statement and I caught it and withdrew it. That is my recollection, because I didn't want to open it up. Now, am I right or am I wrong.

Mr. Campbell: No you did not Mr. Lawson.

The Court: I remember you making the statement. Whether you withdrew it or not, I don't know.

Mr. Campbell: I will refer to the record.

The Court: We will have to consult the record.

Mr. Lawson: I assume it wasn't an issue in the case and I didn't want to make it an issue.

Mr. Campbell: The statement appears on page 3134 and the statement is as follows:

'Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown

you that there is no evidence in this case, in the first place, to support the charges that are made. The question of intent is more or less now a question of an academic one but, in any event, Mr. Irwin has pointed out to you, from the records, the reaction of these men with reference to that document.

Now, to me, it is sort of a bit of sophistry, shall I call it, to say that should you have any reaction to an instrument of that kind there should be any evidence of it, because when you say that you will have to say you assume either the truth or the falsity of the statements therein contained, which are not before you.'

Then he goes on to say that the defendants acted in the utmost of good faith. That is his statement. Now, may I proceed, Your Honor?

Mr. Lawson: Your Honor, I still think that that statement is subject to the position we have taken, that the truth or falsity of the statements made by Mr. Campbell are not at issue, and if counsel is trying to take a different position, I am certainly going to assign that as misconduct.

Mr. Campbell: I am simply taking the position, if the Court please, that when counsel states that there is no evidence in the case, in the first place, to support the charges that are made, we are entitled to look elsewhere in the case and examine the proof elsewhere as compared to the statements made by Mr. Campbell.

The Court: I find the statement directly made on page 3134, line 19, as read by Mr. Campbell, counsel for the Government, and there is some considerable more along the same line.

What was withdrawn was a statement with regard to Mr. Edgerton.

Now in spite of the fact that that document was not admitted in evidence as proof of the truth or falsity of the statements contained in it, but merely to show the intent, the charge of counsel is that there is, as I understand the charge, in the argument, that there is nothing in the record to substantiate any of those charges.

Now, Mr. Campbell proposes to show the jury that there is something in the record to substantiate at least some of the charges, and I see no impropriety in it.

Mr. Lawson: Your Honor, I think that the plain interpretation of the statement made there is that there is no evidence to sustain the charges. Now the charges naturally refer to the charges in the indictment.

The Court: I don't so interpret it.

Mr. Lawson: If you will look at the nature of the comments that are made there by Mr. Campbell, they are not in the nature of charges, they are first in the nature of hypothetical questions, and he so states them. He isn't making any accusation, he is simply raising the question.

The Court: You were the one that raised. Let me read it to you.

'Now, that brings us to a couple of documents that are in evidence. Gentlemen of the jury, the Court has placed the limitation on that evidence, and I know that you will respect it, and I say this considerately and not with the intention of trying to ingratiate myself into your good graces, but if you weren't the type of jury that you are, I would be hesitant about even permitting you to have a document of that kind before you if I didn't feel as though you woud honestly and sincerely respect the limitation and the instructions of the Court with reference to those docu-

ments, because it is important. We are all human. We are creatures of suggestion, suspicion and surmise. We can't help it. Some of us are more than others.

Those documents—that document there of Mr. Campbell has been placed before you solely for the purpose of showing the intent of the defendants. Now, I have shown you that there is no evidence in this case, in the first place, to support the charges that are made."

Now, you didn't mean charges that were made in the indictment, you meant charges that were made in the letter of Dean Campbell.

Mr. Lawson: That would seem to follow, Your Honor—I agree that that is true—but I, of course, didn't intend to open up the matter for discussion. I intended to have it limited to its original purpose, and if the Court will give me an opportunity to reply to Mr. Campbell, I would certainly delight to do that. If he wants to make that an issue in the case, I would like to reply.

The Court: I think you have made it, if it is made at all, and anything that Mr. Campbell may say with regard to the document known as the audit report of Dean Campbell with regard to the statements in that shall not make them in any way evidence.

As I understand it, counsel is simply attempting now, by argument, to show the inaccuracy of Mr. Irwin's statement that there is nothing in the record to substantiate the statements made in the audit report.

Mr. Campbell: That is right, but Mr. Lawson's statement.

The Court: I see no impropriety in that.

Mr. Campbell: You stated Mr. Irwin's statement. You meant Mr. Lawson's statement.

The Court: Yes.

Mr. Irwin: May I address the Court? I feel I would be derelict if I did not interpose an objection to any comment of counsel occasioned by the remark of other defense counsel as going outside the limited purpose for which certain evidence was received.

The Court: I can't see under what theory of law counsel would be prevented from discussing the evidence, whether Mr. Lawson had raised the issue or not, provided the jury understands that he is not trying to show that the statements in this audit report were true or were false. If you disconnect this in your minds entirely from those statements, then I think there will be no danger.

To attempt to prove directly that any of these statements in the audit report were true, considering it as a piece of evidence, would be improper. But I see no impropriety of counsel going on and arguing to the jury and showing to the jury anything that is properly in evidence. If it is restricted he must stick to the restriction.

Mr. Irwin: May we ask for an exception to that?

Mr. Lawson: Yes, Your Honor.

Mr. Campbell: As I stated, I am addressing myself to Mr. Lawson's assertion to you with reference to Campbell's report, Government's Exhibit 46, wherein he states, 'Now I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now bearing in mind, gentlemen, that this document, and the comments that it makes herein, are not evidence of the truth or falsity of what they state, but let us read

these statements and then let us look elsewhere in the record.

Mr. Irwin: That is my objection, Your Honor.

The Court: I don't think I will permit you to do that.

Mr. Campbell: I will withdraw that last statement, Your Honor.

The Court: If you will just lay that audit report aside and go ahead and show anything else you want to with regard to the evidence, disconnected from the statements contained in that audit report, then I think there will not be the slightest impropriety in it.

Mr. Campbell: Yes, but I think, if the Court please, in view of the reference made to this report by Mr. Lawson, I am entitled to refresh the jury's memory as to the contents of the report.

The Court: Well, you have a perfect right to read that report so long as the jury understands that it is in evidence here only for the purpose of showing intent.

Mr. Campbell: I understand that.

Gentlemen: I am going to refer you to this Exhibit 46, which is here only for the purpose of intent, limited to the defendants Edgerton, Ireland, Smale, Thomas, and Starr, and not as proof of the truth or falsity of anything contained in the report. I wish to read from it.

'Possibly the matter of utmost importance to the Directors should be the prime question of whether or not the company in its entirety is fraudulent. These specific points should be considered by the Directors with the idea of applying constructive remedy if (1) the Investment Finance Co., is a fraud, and (2) if any remedy be available. Certain hypothetical questions are set forth for your consideration.

The questions propounded are based on the unquestioned fact that (1) control and ownership of this company and the First Security Deposit Corporation are so closely interlaced as to appear identical in effect (see schedules V, VI, and VII); (2) profits which might accrue to the First Security Deposit Corporation would be diverted to the narrower limits of the fewer shareholders of the Investment Finance Co. to the loss of shareholders in the former company; and (3) funds used to promote the various enterprises were basically the funds of the First Security Deposit Corporation.'

Now, referring to that document Mr. Lawson has said:

'I have shown you that there is no evidence in this case in the first place to support the charges that are made.'

Now, gentlemen, we have shown you, and Mr. Lawson frankly admitted it, that the defendants had and maintained control of these corporations, including the First Security Deposit Corporation and the Investment Finance Company.

Our evidence has shown you that funds—first, that funds were lent from the First Security Deposit Corporation to the narrower limits—narrower stockholder limits, narrower stock interest limits—of the Investment Finance Company and we have shown you here that those funds were used by the Investment Finance Company to obtain a profit for that company on bond transactions to the loss of the shareholders of the First Security Deposit Corporation. So much for Mr. Lawson's statement.

Mr. Irwin: Your Honor, I assign that last comment by counsel, since he has finished reading, as a direct

violation of Your Honor's admonition that he is not to comment on the truth or falsity of the statement.

Mr. Lawson: In which we join also, Your Honor.

The Court: The exception will be disallowed."

[Assignment of Error XXVII, R. 1108-1134; Bill of Exceptions, R. 89-90, 99-105, 136, 143-145, 231-232, 84-85, 251-256, 267, 611-615]:

Said District Court erred and was guilty of conduct prejudicial to the defendant in suggesting and intimating that the defendants should stipulate to certain facts rather than requiring the plaintiff to prove the same, as follows:

(A) The plaintiff's witness, Frank E. Morgan, testified that he was a deputy county clerk of Los Angeles County and that he had produced the articles of incorporation of the First Security Mortgage Corporation, and amendments thereto, from the official records and files of the County Clerk's office.

"Mr. Campbell: This file, being file No. 51694 of Los Angeles County, being the articles of incorporation of the First Security Mortgage Corporation, together with amendment of said articles changing the name thereof to First Security Deposit Corporation, the original articles having been filed November 25, 1931 and the amendment thereto being filed July 25, 1932, it will be offered as Government's first in order.

Mr. Irwin: I think, Your Honor, for the purpose of objection until counsel can examine it, in the interest of time it should be marked for identification at this time and we can examine after the recess. We must, of course, ask leave to examine it before it is received. If he would

just content himself about marking it for identification at this time we could examine it as soon as we conclude here.

Mr. Campbell: May it be marked for identification at this time?

The Court: I am not in the habit of wasting the time of the Court and the jury on examinations of documents. If anybody has any document or record that they intend to produce in evidence, I want them to notify the other side and during the recess or at odd times have them examine it. I will not stop a trial to have any such documents examined. Those must be examined during a recess and not waste the time of the jury. I caution all of you, if you intend to introduce any documents in evidence that are matters of public record, unless you show the Court in advance that the revelation of that will be prejudicial, to show them to the other side in advance and have it stipulated to.

And now, clearly, there is nothing secret about these articles of incorporation and the amendment. They either are or aren't. They should have been stipulated to and this could all have been done in five minutes.

The document will be marked for identification. And I hope by a stipulation the first thing in the morning it may be received in evidence.

(The file referred to was marked as Plaintiff's Exhibit 1 for identification.)

The court thereupon made the following statement:

The Court: Very well. Let's proceed. We have a lot of things to take care of without a lot of technicalities. And when a document of that kind is introduced in evi-

dence and shows later it is spurious, it, of course, can be corrected. I am not going to waste the time of myself and the time of the jury while a lot of technical objections that are of no value, except to take the time of the Court and jury, are entered into.

Proceed." [Bill of Exceptions, R. 89 *et seq.*]

(B) Upon plaintiff's witness Milton Shaw being sworn to testify, the Court made the following remarks:

"The Court: I think possibly before we start in with this case that I ought to explain to counsel and to the jury what my position will be uniformly in connection with this case in order to save a lot of time.

As I have said in a statement previously in this trial and just immediately, that it is impossible for the Government or for the defendants to prove everything at one time, and it is impossible for proof to be made in either a chronological order or a logical order sometimes because, while the witness is on the stand, instead of recalling him several different times to get matters in either in chronological or logical order, it is better to take all of that which is his testimony and be done with it.

Now in a conspiracy case seldom is it possible to have direct evidence. Sometimes it is as to parts, and sometimes not. The conclusions have to be arrived at by a series of happenings, what I described in part at least as circumstantial evidence.

Now the admission or non-admission of testimony as it is presented by the Government is largely within the discretion of the Court in the exercise of careful, cautious judgment to protect the rights of the defendants. * * * So as to not waste the time of the jury by having them

listen to evidence which I am later going to have to strike, where I feel, from my knowledge of the facts made here and my experience in trying conspiracy cases, that the offer is made in good faith and that there is a reasonable ground to believe that it can and will be properly connected up, I shall admit it, reserving to counsel for the defendants the right at the conclusion of the Government's case to move to strike any evidence which has been admitted but which has not been properly connected as to being binding upon all of the defendants or as to be binding as against a particular defendant on whose behalf the motion is presented to the Court. * * *

* * * Now I don't believe that it is going to be necessary for counsel to continue to take the time of the Court and jury to make the objection that the evidence is being put in out of order, and that the conspiracy hasn't been yet proved, and so on and so forth, where I am reserving to them the right to strike. * * * The only thing I say is that I shall give you a right to move to strike in the event something isn't connected up. That is going to save every time you get an idea that something isn't in chronological order each one of you getting up and moving to strike on the ground that something else hasn't yet been proved. I am going to give you a right, if it isn't properly connected up, to move to strike that particular evidence.

* * * * * * * * *

If you are perfectly satisfied that those records are the records of the State Corporation Department and that they are proper records of that department, why waste the time for the four of you to get up and make the objection and compel the Government to go *and the* witness

back and put him on the stand and go through the formalities which you know perfectly well they are going to be able to get through just to make a technical point. That is why I objected to an objection to a document from the Secretary of State's office. Why object to an exemplified copy or to any particular copy and compel a lot of time to be taken which, in the long run, is of no value to anyone except the delight of the lawyer to make technical objections and have them sustained.

Mr. Irwin: With all deference to the Court's remarks —I quite agree with Your Honor as to the fact that a record is a record of the State—but what that record may contain, I don't know. We have never seen it. It can very properly accuse somebody that had no relation with this case of the most heinous crime if he sat silent and didn't let counsel note an objection and then in argument read it to the jury.

The Court: Now manifestly it isn't fair, nor is it proper, to bring a whole set of records of the State Corporation Department and expect to have them introduced in evidence without counsel for the defendants having abundant opportunity to examine those records and determine exactly what they contain, because it isn't a question as to whether authoritative records, it is a question of whether they contain matter which may be entirely immaterial, may be scandalous, may be prejudicial, may be hearsay, may be collateral, may have absolutely no bearing upon the trial of this case.

* * * * * * * * *

You should have an opportunity to examine those and any other documents that are going to be submitted so

that we may not have to take the time of the Court and the jury to do it in the court room.

Now they are not yet admitted, and I shall charge you with examining them within a reasonable length of time so that if they are proper they may be admitted in evidence. If they aren't proper, they may be excluded.

You may proceed." [Bill of Exceptions, R. 99-105.]

(C) "The Court: Of course, I don't think the Government is required to earmark their testimony as applicable to anything. If it is admissible, it goes in, and it is up to you on cross-examination and on argument before the jury to show that it is not applicable to your particular client or to particular situations.

I see no way, unless we are going to be here to celebrate Christmas and New Year's, to do it otherwise than to get these books before the Court and get them in.

Now, they are there. You can cross-examine as to them. You can subpoena these witnesses and bring them in as a part of your own case on defense, if you wish. If there has been any misrepresentation, or if there are signatures or anything of that kind that aren't genuine, all you have to do is to establish that fact and we will strike them out.

But I shan't stay here until Christmas to satisfy a lot of technical niceties. I want to get this evidence in, get it in a way that will be protective to the defendants, but we have to get the evidence in and you must put it in piecemeal and you can't put it in either chronologically or logically in conspiracy cases, as I see it. * * *

Mr. Irwin: * * * If the Government is allowed to dump in the whole thing, then the burden is placed upon

the defendants to prove their innocence instead of on the Government to prove their guilt. * * *

The Court: Of course, I can't follow you there at all, because the mere fact that this evidence is in, the jury hasn't seen it, the jury doesn't know what is in there, and it is a long time before they are going to see it. In the meantime you have your right of cross-examination, and if these records, after your examination of them, prove to be immaterial or incompetent or not available as evidence, we will strike them out. But we can conceivably, with five or six technical lawyers, take three weeks on one book. That is just exactly why the Congress decided to get rid of these ultra-technicalities of the admission of books and records of corporations and entries in them.

I have seen technical lawyers keep a court going for three weeks on getting in one book. That has been in the past quite a common experience." [Bill of Exceptions, R. 136-137.]

(D) "The Court: I am going to go over this again, and I am going to do it for the final time because I am not going to keep on repeating it.

The way I propose to permit this case to go in—and I shall have due regard for the rights of these defendants —this case cannot all be put in at one time. That is very manifest. It covers many defendants, many transactions, many years, many books, many records. Now, I am not at all sympathetic with the position that it is very harmful before this jury because the jury don't know anything about what are in these books, and certainly no harm can be done.

I am not sympathetic with any surprise with regard to it. It is inconceivable to me that lawyers would prepare

a defense in this case without going to the records of the State Corporation Department and the Building and Loan Commissioner and finding out what they contain. I don't propose to stop the trial and keep the jury here while they examine records which, in the exercise of their duty as the attorneys, they should have examined some time ago, as I am satisfied they did examine. * * *

* * * Now I recognize that you gentlemen are retained to defend your clients, and you are doing the very best you conscientiously can to protect their interests. There can be no doubt about that in the minds of anyone. I try to be fair to the defendants, as I am to the Government. I sometimes may seem a little critical of lawyers who try criminal cases because I think they use all the tricks in the bag by way of technicalities, and I usually try to prevent as much of that as I can where I think it is just a waste of time, and where we aren't getting anywhere by it. That is why I made the statement I did when objection was made to the introduction in evidence of a document from the Secretary of State's office." [Bill of Exceptions, R. 143-145.]

(E) "Mr. Campbell: If Your Honor please, the element of time is not of singular importance to me in that I am employed on an annual salary, but I had not understood that there was going to be any question that these were not the books and records of the company, but as the Court can appreciate, it is going to take us a great deal of time beyond our estimate of the time of this case if we have to prove the individual items, and produce the individual bookkeepers, where, as in the case of this witness, he does not remember certain entries or who made certain entries; and therefore can not say he made them directly.

The Court: Well, it does seem to me that there is someone among the defendants who knows whether those are the books and records of the corporation, and kept in the regular course of business, and that it was the course of business, and that they are sufficiently interested to shorten the time of trial. I suppose it would take somewhere between five and ten days to prove all of these, possibly considerably longer, and it would require the bringing in of a number of witnesses. Now, if the defendants and their counsel wish it that way, there is nothing I can do about it." * * *

Mr. Adams: May I, on behalf of the defendant Twombly, offer this stipulation, which I think may save us a lot of time, that where the witness, without any waiver of the objections I have made or the benefit of the ruling —that where the witness testifies that he made a certain entry himself or a certain entry was made under his direction, that we eliminate the two questions and answers: 'Were these records made by you in the regular course of business?' and 'was it the regular course of business to keep such records?' because that repitition of that is taking time all of the time and I see no necessity for it.

The Court: Well, of course, that is supposed to apply to the entire group, but in order to be safe, counsel has been doing that.

Is that satisfactory to all of the defense counsel to have it so stipulated?

Mr. Irwin: Your Honor, you recall I offered that stipulation yesterday afternoon and Mr. Campbell said he didn't desire to accept it. It is still most satisfactory to me.

The Court: Is it satisfactory to you, Mr. Lawson?

Mr. Lawson: Yes, Your Honor.

The Court: You, Mr. Butler?

Mr. Butler: Yes, it is, Your Honor.

The Court: Very well. That stipulation will be received. [Bill of Exceptions, R. 218-219.]

(G) During the course of the examination of plaintiff's witness, Perkins, the following occurred:

"The witness further testified: That Plaintiff's Exhibit 141 for identification, a letter dated February 27, 1934, is a letter which he sent or caused to be sent to the holders of collateral trust certificate due May 1, 1934; that it was mailed or caused to be mailed on or about February 27, 1934. That the circumstances under which he sent and mailed that letter were the same as the previous letter.

'Mr. Campbell: May this be marked Exhibit 141 for identification?

The Court: It may be so marked.

Mr. Irwin: So I will be correct, counsel, are we jumping by 140?

Mr. Campbell: Yes.

The Court: Now, I think that we waste a lot of time by these questions as to numbers. I am not going to require the plaintiff to put these documents in according to any particular order, and counsel will simply have to take the number and check afterwards, instead of wasting the time of the court during these short sessions. These documents can be available from early morning until late at night, and counsel can check them afterwards, rather than waste our time during the session.'" [Bill of Exceptions, R. 231-232.]

(H) At the conclusion of plaintiff's opening statement, the following proceedings were had:

"The Court: Now, gentlemen, it is quite apparent to the Court and the jury that there are a number of different corporations involved here. It may be a little easier for the Court, because of his particular training, to follow these transactions which I think, by the questions, I was able to do. I am not so sure that it was possibly quite as easy for all of the members of the jury. Some undoubtedly followed it just as well as did I, and possibly much faster.

I want to ask counsel for the plaintiff, and for the defendants, and ask the jury, if it wouldn't be of great assistance to all of us to have counsel, that is, counsel for the plaintiff with the approval of counsel for the defendants, get up a chart and put these corporations' names down on that chart in large type and put it on easel so that we will have it up here all the time.

First, Railway Mutual Building and Loan Association. Now you can, if you wish, put the capital structure of that off to one side, at least put the date of its organization and possibly a separate sheet showing its capital structure.

Then, second, the First Security Mortgage Corporation, then the First Security Deposit Corporation, then the Realty Deposit, then R. F. D. Discount, then Consolidated Investors, then Investment Finance Company, and then the American Bank, American Building and Investment Company, the Bond 17 Dog Food Company, and so on, so we will have here all the time these names and we will be able to fit those particular corporations into the picture.

Now, wouldn't that be helpful to you gentlemen?

(Jury assents.) [Bill of Exceptions, R. 84-85.]

Will you gentlemen prepare such a chart?

Mr. Campbell: Yes. I will be glad to.

The Court: With the assistance of counsel for the defendants.

Mr. Lawson: Yes.

If Your Honor should consider that a number of those companies are pertinent to this case, I think it will be a very helpful suggestion, but I would like to be heard in argument as to the limitations that counsel for the Government here has gone into on the case which he proposed to submit.

I would like to present to Your Honor the proposition that there are only three companies involved, that is, the First Security, the Investment Finance and the Railway Mutual.

Our position in regard to a great many of these matters that he has gone into, Mr. Campbell, are not relevant to the case and will only lead to confusion.

The Court: Well, it isn't going to do any harm because certainly if I rule that the affairs connected with any one of these corporations on this chart are to be ignored by the jury, they are going to ignore it, and that is that, and yet I think the continuity is there and that it would be very helpful to all parties to have them there.. [Bill of Exceptions, R. 86.]

We may not use all of them, but we may use some, and in any event, we will have the picture, and rather than being a detriment to the defendants, I would think it would be helpful to clear the whole situation up." * * *

"Mr. Adams: I don't think we ought to put upon any chart the name of an individual or company in which any particular investment was made. In other words, I think the jury might be aided by showing the diversification from the Railway Mutual to the First Security and then from the First Security to the Investors Finance."

* * * * * * * * *

"The Court: But on this chart we have the original company, Railway Mutual Building and Loan Association, then the First Security Mortgage Corporation, which was its successor, or which took over certain assets. Then the name of that was changed to First Security Deposit Corporation. One of the subsidiaries of that, as I understand the remarks of counsel, is the Realty Deposit Company.

Mr. Lawson: Your Honor, that was a bookkeeping arrangement on the books.

The Court: Regardless of that, the name will undoubtedly appear, and we will want to know where it fits in.

Then the R. F. D. Discount Company, an affiliated organization.

Now, then, Investment Finance Company clearly appears in the chain of circumstances. I don't know to what extent Consolidated Investors was discussed by the Government in the opening statement.

Mr. Campbell: It is simply the successor or name change of the R. F. D.

The Court: That is what I thought. That can be shown.

Now, then, the State Investors Corporation, I am not just sure as to that.

Mr. Adams: That, Your Honor, is the place where I suggest Your Honor stop. When we get to Investment Finance Company, that is the Company that Mr. Campbell has alleged for the Government loaned, or made unlawful loans to this, that and the other company.

The Court: I understand the State Investors Corporation, American Building and Investment Company, American National Bank of Santa Monica, Bond 17 Dog Food Company, Pacific Brick Company, and Pierce Petroleum Company, were companies entirely outside of the capital structure purview of these corporations.

Mr. Adams: Yes, sir.

The Court: They were corporations in which money was alleged to have been invested from time to time.

Mr. Adams: Yes.

The Court: All right. We will have no confusion then. Let's confine our first chart to these seven. We have the names, the dates of organization, and the capital structure."

(I) During the course of examination of plaintiff's witness, Clarence M. Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that is not the best evidence.

* * * * * * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes

to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours?

Mr. Lawson: May I make my position clearer with reference to that, Your Honor? The use of a summary by an accountant is well recognized for financial matters, the figures, the bookkeeping; I understand that. I am objecting against this witness, who is qualified as an accountant, to testify as to what the minute books, the by-laws, or any other written matter that has been introduced here, as to what those records may contain.

* * * * * * * * *

The Court: The objection will be overruled. You may answer that question.

Mr. Lawson: Exception.

The Witness: Seven, up to a certain date.

Q. Was that number subsequently changed?

A. Yes, sir.

Mr. Lawson: May my same objection run without repetition? With the understanding, the same ruling and an exception allowed.

The Court: Yes. I am only going to allow him, if you insist upon the objection, to ask for the number of directors, provided from his examination, with the under-

standing that if the information is not correct, for any reason, that counsel will have an opportunity to correct it, either on cross-examination or by calling the Court and the jury's attention to the record."

The witness further testified: That the by-laws were amended subsequent to February 16, 1938, so as to provide for five directors of the First Security Deposit Corporation.

"Q. Mr. Bruce, as an accountant, did you also examine the charter and by-laws of the corporation, which have here been placed in evidence, for the purpose of determining what stock should be voting stock? Answer that yes or no.

A. Yes.

Q. And what did your examination disclose?

Mr. Lawson: Same objection Your Honor.

The Court: The objection will be sustained.

Mr. Campbell: May I have Government's Exhibits 1, 9 and 18?

Mr. Adams: Your Honor, while counsel is examining that, might I call your attention to the fact that in the schedules the addition is incorrect?

The Court: The schedule has been objected to by Mr. Lawson, so that it is not of any moment to us.

Do I understand, Mr. Lawson, your objection goes to these charts so that the Government need not go to the trouble of preparing those charts? If you object to one, I understand you object to both.

Mr. Lawson: Your Honor, I don't object to what I consider the companies involved here. not the First Secu-

rity and the Investment Finance Company, and the Railway Mutual.

The Court: Is this company not the First Security?

Mr. Campbell: It is the First Security.

Mr. Lawson: That is the First Security. I have no objection to any pictorial representation as to whatever the facts are with that one correction on the legend.

The Court: But you did object and require the examination of the witness and required the production of all of the original documents to prove it. Now, what is your position?

Mr. Lawson: My position is that I am anticipating this witness' attempting to summarize the minutes of the meetings of the Board of Directors to show certain facts. Now, so far as the number of directors, the capital structure, the stock issued, I haven't any particular objection to that. I am simply preserving my rights with reference to what I have anticipated will come.

The Court: What I am trying to do here, and when I suggested the preparation of these schedules, was to save time. That doesn't seem to have been effective because you have objected to the schedules produced to permit a stipulation with regard to them, and now you have objected to the testimony of the witness who prepared the schedules, and have insisted upon going back to the original documents.

Now, I want to know: What is your position. You either object or you don't object.

Mr. Lawson: I have tried, Your Honor, to make my position clear in that I am not trying to be obstreperous or trying to consume time. I am simply as I stated

to Your Honor, anticipating what this witness is going to testify as to what may be contained in the minutes.

The Court: When the schedule was attempted to be introduced, you (referring to Mr. Lawson) objected to it on the ground that it was a summary, although nothing was said at the conference before the bench, nor was any objection made by you, so far as I know, at the time it was proposed. Now, if your position is that you object to it, I want to know it, because then it can't be used. It can only be used, as I explained in the first place, by agreement of all counsel in order to save time. If you object to this witness' testifying as to what he has gleaned from these books, your objection then will have to be sustained and we will have to have each one of these entries read to the jury. We will have to go back and read the articles of incorporation, that portion of it dealing with the capital structure; have to read that portion of the by-laws dealing with the number of directors; we will have to read each minute of each corporation showing when there was an election and when there was a change." [Bill of Exceptions, R. 251-256.]

(J) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you point out to me, Mr. Bruce, where that is contained?

A. (Examining book.) (Pause.)

The Court: I think possibly I ought to make it clear that no past objections will be given any validity now at our change of plan or program. I only permitted the objection to hang over because I thought we were trying to save time. From now on the objections must be made

specifically and exception save at each point as to each defendant.

Mr. Irwin: * * * There are certain meetings, some of my defendants were not there, and some of them were. As to those that were there there is no objection * * * But it will be necessary for me to follow counsel, or to ask counsel in reading to state if any directors were absent, and then interpose the objection of hearsay.

The Court: Yes, you will have to make a technical objection if we are going to have to go back to all of the original documents and take the time to go into those. You are not able to stipulate as to who are officers and directors of this corporation from time to time, the stock that was outstanding, and so forth, and we have to go back to the original; so there will be no other way to it, than for you to make objection.

Now, as I understand it, you were willing to so stipulate, but there is nothing that I can do about it so long as counsel for one of the defendants make objection. The objection is sustained, and we will have to go to the original records and all defendants will have to be governed then accordingly.

Mr. Irwin: Very well, Your Honor." [Bill of Exceptions, R. 267-268.]

(K) "The Court: Now, the matters before the Court are the minutes of the stockholders' meeting of the Pierce Petroleum Corporation under date of February 19, 1937. That was just one, was it?

Mr. Campbell: Yes.

The Court: Exhibit 84. And the letter dated January 3, 1936 passing between Pierce Petroleum Corporation

and Investment Finance Company. The Court rules that both of these documents are admissible to show intent.

You may now ask for a stipulation as to signature.

Mr. Adams: We wish an exception to the ruling.

The Court: You may have the exception.

You may ask for Mr. Adams' stipulation as to the signatures.

Mr. Campbell: At this time I will ask if it may be stipulated.

Mr. Lawson: For the purpose of the record may we have an exception?

The Court: Yes, it hasn't gone in. I will take care of that when the time comes. Give them numbers for identification now.

The Clerk: The letter will be Plaintiff's Exhibit 180 and the minutes 181.

Mr. Campbell: Might it be stipulated that—

Mr. Adams: May I ask a question first? Your Honor, in admitting these minutes, Your Honor is admitting them over the objection of no foundation?

The Court: No. It was my understanding that these documents which were being shown, signed by any of the defendants, that they were to be admitted on the stipulation of the signature, and I have been following that policy.

You said that you would now, if you ever entered into such a stipulation, withdraw from it and would insist upon the Court's first passing upon its materiality, and then you wanted it handed to you, and rather than require a handwriting expert to prove Twombly's signature, then you would then determine what you would do about it.

Now, I haven't admitted this in evidence. I have simply ruled it is material on the question of intent. I have asked counsel to submit it to you, and ask you whether you are willing to stipulate.

Mr. Adams: I don't understand you frankly. I am at a loss. I said to Your Honor that if Your Honor admitted it in evidence—now, Your Honor just said you are not. I don't know whether it is admitted, or whether it isn't. If it is admitted then it must be admitted for some purpose. What I am trying to point out, if Your Honor overrules my objection of no foundation, if Your Honor then overrules my objection of hearsay, if Your Honor overrules my objection of not being material, if Your Honor then admits it in evidence, then I will be glad to stipulate to the signature, but I want Your Honor's ruling on the matter of foundation and other points.

The Court: You are asking the impossible. How can I admit a thing in evidence when there is no foundation laid so far as the signature is concerned?

What you just stated you had said wasn't what you said at all. You said if I would rule it was material, rather than put the plaintiff to the trouble and expense of bringing in handwriting experts, that you would then determine whether you are going to yield and say that the signature of Mr. Twombly was genuine.

Mr. Adams: I felt, Your Honor, this way, as Your Honor well said to me the other day, foundation for a document may be laid in many ways.

The Court: That is right.

Mr. Adams: Foundation for this document is being laid in no way except through the signature of Mr. Twombly.

The Court: That is it, exactly. I have already ruled that no other foundation was laid and that other foundation will have to be laid in so far as the defendant Twombly is concerned unless you are willing to stipulate that those are the genuine signatures of your client.

It cannot be admitted because no foundation has, as yet, been laid as against your client.

Mr. Adams: I won't stipulate to anything at the present moment then under the ruling, and I take an exception to the ruling.

Mr. Campbell: If Your Honor please, may I withdraw these two exhibits from the identification numbers?

The Court: Yes. Just leave the identification numbers on them.

Mr. Campbell: May I withdraw or take with me the two exhibits?

The Court: You may take them out of court.

Mr. Campbell: Now, I wish to read from the minutes of the Investment Finance Company Might I state, Your Honor, that the statement I made just prior to the noon recess that the evidence now being offered is being offered as to all defendants with the exception of the defendants Twombly and Cronk still apply?

The Court: Before we go into that, I think I want to explain my ruling. Maybe I haven't made it clear.

These minutes and a letter to which I alluded were offered in evidence. There was no foundation laid for their admission by having anyone take the stand and show that they were the records of the corporation kept in the regular course of the business and that it was the habit of the company to keep records of that type.

In the absence of that foundation the documents were, regardless of how I felt about their materiality if ad-

mitted, they were not admissible unless they could be admitted under the stipulation which we have heretofore had, * * * counsel making the point that no proper foundation was laid, and refusing to take any position as to signatures, they cannot at this time be admitted without a further foundation as to the defendant Twombly.

As to the defendants represented by the two attorneys, they may be admitted under the stipulation." [Bill of Exceptions, R. 611-615.]

[Assignment of Error XXVIII, R. 1134-1140; Bill of Exceptions, R. 147, 227-228, 251, 616-617, 679-680, 698 and 818]:

Said District Court erred and was guilty of conduct highly prejudicial to the defendant Edgerton before the jury in the following particulars:

(A) During the course of the examination of plaintiff's witness Florence Anderson, the following occurred:

"Q. But you can definitely state that those whose names I have given you with the addition of Brayton, were directors as of that date?

A. I can.

Mr. Irwin: Pardon me, Your Honor. I hate to interrupt but I think that is misleading, that last question, that those he has named with the addition of Brayton were directors. We know that there were at least seven or nine and he has a list in front of him. I think we are entitled to have the entire board.

The Court: Now. I am not going to have to call this to your attention again. The plaintiff is entitled to put in its case * * * You may bring out those matters on

cross-examination and I shall not tolerate any more interruptions of that sort." [Bill of Exceptions, R. 197-198.]

(B) During the course of the examination of plaintiff's witness, Perkins, the following occurred.

"Asked who handed it to him for his signature, the witness answered: 'I presume it came from the manager's office; that is my best recollection.' (Thereupon Plaintiff's Exhibit 139 for identification was received in evidence. Said Exhibit is separately certified pursuant to stipulation and order of Court.)

"Mr. Campbell: I will ask to have marked as 139-B the portion of this file. With counsel's permission, may I take the two mimeographed letters away from the clip?

Mr. Lawson: Not only with my permission, but it would be very much in accord with my conception of how these letters should be introduced, that they should be introduced separately.

The Court: Just say "yes" and save a lot time.

Mr. Lawson: Your Honor, I want to call Your Honor's attention to what I think is—

The Court: (Interrupting) I don't want any discussion in front of the jury. You consent. That is all that is necessary.

Mr. Lawson: I consent, provided he goes all the way.

The Court: I want the jury to get their evidence from the witnesses and not from the lawyers." [Bill of Exceptions, R. 227-228.]

(C) During the course of the examination of plaintiff's witness, Bruce, the following occurred:

"Q. Will you state from such examination what the by-laws provided as to the number of directors of such corporation?

Mr. Lawson: Objection that it is not the best evidence.

* * * * * * * * *

The Court: I don't feel that the jury should be required to sit here from now until whatever time it takes to bring out each minute book, each article of incorporation, to examine each by-law, examine all the minutes, to fish out for themselves here in open court, for the gratification of anyone, all of this detailed information, when it is available in summarized form; and if incorrect is subject to correction where the books are available. There is nothing mysterious about it at all. It is a case of he who runs may read. Why should we take ten days to accomplish a thing that can be done in a couple of hours." [Bill of Exceptions, R. 251.]

(D) Upon offer of Plaintiff's Exhibit 46 in evidence the following occurred:

"Mr. Lawson: Your Honor, the matter really hasn't received a great deal of attention, and I think it is a very important part. Your Honor has read the comments, and you are familiar with them. I merely submit this is a test: That if the witness were on the stand himself, he wouldn't be permitted, under objection, to testify, because he would be stating opinions and conclusions. I think that is sound, Your Honor.

The Court: I disagree with you on that. I shall when the time comes instruct the jury that this is not being admitted to prove the truth of the statements contained in it, but simply to show that that information was communicated to the defendants. You mean to tell me that if that auditor told these defendants that he permitted to say that he told them in person?

Mr. Lawson: Under the circumstances of this case I would take that position, Your Honor.

The Court: Then that is a matter that will have to go to the Circuit because I disagree with you on it. I will admit it on that point. It is not being admitted to show the truth or falsity of what is contained in that auditor's report, but to show that that audit report was delivered to these directors.

Mr. Lawson: I would like to have included in the objection, which I have already made, the specific objection of hearsay. And further, that it has not been connected up in this manner; that the mere fact that it was on file with the corporate records is no proof of the direct knowledge of the defendants Ireland and Edgerton." [Bill of Exceptions, R. 616-617.]

(E) During the course of the examination of plaintiff's witness Grace Benn, the following occurred:

The witness testified "I think the gentleman I talked to that time was Mr. Ireland. At that time I discussed the purchase of my securities."

"The Court: Will you in the brown suit stand up?

(The gentleman arose as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: No.

The Court: Will you stand up?

(The gentleman referred to arose, as requested.)

The Court: Is that Mr. Ireland?

The Witness: I don't think so. I just saw him the one time.

Mr. Lawson: May the record show that is Mr. Ireland.

The Court: You are Mr. Ireland, are you not?

The Defendant Ireland: Yes, Your Honor.

The Court: Stand up again. Is that the man you talked to, if you know?

(The defendant Ireland arose, as requested.)

The Witness: No, I don't think so." [Bill of Exceptions, R. 679-680.]

(F) During the course of the examination of plaintiff's witness, Audra D. Jones, the following occurred:

"Q. Do you recognize the gentleman in the court room with whom you had conversation on that occasion?

A. I don't think I would.

Q. Well, will you look about the court room and see if you see him here?"

Thereupon the Court directed each defendant successively to stand and inquired of the witness if such defendant was the person with whom she had the conversation and the witness in each instance replied "No" or "I don't think so." [Bill of Exceptions, R. 698.]

(G) Plaintiff by reference incorporates paragraphs (A) (B) (G) (I) (J) (K) of the Assignment of Errors No. 27 as a part of this Assignment of Error con-

stituting conduct of the Court in the presence of the jury highly prejudicial for the defendant Edgerton.

(H) Following the introduction in evidence of defendant's (plaintiff's) Exhibit 39 reciting details concerning financial transactions of the Investment Finance Company with Pierce Petroleum Corporation and Charles E. and Maryan A. Kenner and subsequent to the admission in evidence of Plaintiff's Exhibit 46 (216), the Court made the following statement:

"The Court: Now, Gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned."

[Assignment of Error XX, R. 1068-1072; Bill of Exceptions R. 950-953]:

Said District Court erred in his rulings with respect to certain motions and objections made to portions of remarks of the plaintiff during its closing argument and in his comments with respect thereto, as follows:

"Mr. Campbell: Now it was stipulated here that the investors did not sign the plan itself but that a brochure was circulated among the depositors of the Railway Mutual and in it there was an authority or consent to the plan with an instruction that they might go to the office of the company and examine the document if they so wishes.

Now, gentlemen, it is the contention of the Government that it doesn't make any difference whether one, none, or 5,000 investors went down and actually examined that plan. The representation was there and it was meant for anyone who examined the plan, and they were all invited to examine it. And when reference was subsequently made from time to time to this plan of agreement, and the people were told that that was being done or was going to be done, it was done with reference to and according to that plan and under its terms, they had the right to believe that that was so and that that was being done.

Now the evidence here in this case shows, as I recall, only one change, and that was with reference to a bond which was to be given. If any other changes were made I don't know where they are in evidence.

But the investors, in the absence of the change of those provisions, had the right to rely upon the fact that such representations and promises would be kept at all times.

It is a very similar situation—you gentlemen have had corporate experience, and you are aware of the fact that whatever type of corporation you set up you don't know what the future contingencies your company is going to have to go through. If you are forming a corporation, let's say, for a grocery store, it may be in the future that you may want to own the real property where your grocery store is located, or you may want to branch out and have several grocery stores. So although the purpose of your corporation and your object is to have a corporation operating grocery stores, yet you reserve and set forth a number of rights which you maintain and retain so that when those contingencies arise, they can be taken care of.

In other words, let us use this illustration: Suppose some friend comes to you and says, 'My friend, I have just organized a company down here called the A. B. Grocery Company. I am going to buy a chain of three grocery stores and operate them. It looks like a good business, and you put your money in and we will be in the grocery business. That is the purpose and object of my company, and that is what we are going to do with the money.'

So, you put your money in with him. Time goes by and you wonder how the grocery business is getting along, so you go down to find out about it. But you find that instead of any grocery stores, that you friend is operating a hotel and you say, 'Well, where is our grocery business?'

And he says, 'Well, this is our grocery business. We are operating this hotel.'

And you say, 'Wait a minute. I put in my money to operate a grocery business. This was the object and purpose.'

'Oh, no' says he, 'Look down here in paragraph 83. The corporation reserves the right to own and operate real property, and that is what we are doing.'

Now, that is very similar, gentlemen, for practical purposes to the situation we have here. These people were told, or at least they were intended to be told, and for practical purposes they were told through this plan and agreement that the money would be invested in certain ways.

Mr. Irwin: Pardon me. I cite that last statement of counsel as deliberate misconduct and ask the Court to instruct the jury to disregard it.

The Court: Read the statement, please.

(The record referred to was read by the reporter.)

Mr. Irwin: There is no evidence at all that that plan was ever communicated to anybody and I assign that, most respectfully, as misconduct.

The Court: Now, I don't so understand the evidence. I understood the evidence that this plan was called to the attention of those who made the exchange of Railway Mutual Building and Loan stock into the First Security Deposit Corporation stock; and that the text of that plan was available to all of them.

Mr. Irwin: True, Your Honor—

The Court: And it has been relied upon in argument of nearly all of defendants' counsel in connection with their arguments as to what the First Security Company could do under the plan.

Mr. Irwin: Very true, Your Honor, but when the misstatement is made that those representations were directed to any of these victims, there hasn't been a one of them who got on the stand and testified that he ever heard or read of it other than what is contained in the brochure and it would be admitted that there is nothing in the brochure about any of the details of the plan.

The Court: I think you are mistaken about that. I am satisfied that I heard the question asked of these witnesses on the stand if they deposited in accordance with the plan and they made reference to the plan."

[Assignment of Error XXIII [R. 1083-1088; Bill of Exceptions R. 414, 416, 419, 427, 430, 441, 445-460]:

Said District Court erred in sustaining the objections of the plaintiff propounded to the Plaintiff's witness Kate O. Wright on cross-examination as follows:

"Q. Calling your attention to Government's Exhibit 145, which is a letter dated March 30, 1937, that in part reads: 'We now have available funds with which to purchase First Security Deposit Corporation bonds and for a limited period will pay the best cash market price available to any who desire or need money at this time for current needs or other investments.'

After the receipt of that letter, did you make any effort to determine what was the market price of those securities?

Mr. Campbell: Objected to as incompetent and improper cross-examination, and immaterial. * * * Assuming that investigation was made and that it either did or did not, as far as her investigation was concerned, disclose the truth or the falsity of that representation, that would not only be hearsay, but it would not in any degree reflect upon either the guilt or innocence of the defendants here.

Mr. Lawson: I am bearing in mind the announced purpose that counsel made to Your Honor for the introduction of the correspondence, what he intended to prove by that correspondence.

Mr. Campbell: Yes. My announced purpose is to show that the statements made to this witness were false, but any investigation or hearsay which she obtained, proving or disproving its falsity would not be a material element and it certainly is not proper cross-examination.

The Court: Well, I follow your reasoning and I am inclined to agree with you on the last objection as not proper examination. I won't say what position I will take as to the other matters when they come in as part of the defense.

Even so I think this particular question is proper on cross-examination, this one that she may answer yes or no. Will you please read that question once more?

You may answer that question as yes or no: Did you make any investigation?

The Witness: I believe not.

By Mr. Lawson:

Q. Did you consult Mr. Richmond with reference to that matter as to market price?

Mr. Campbell: I object to that as incompetent and immaterial.

The Court: Objection sustained as not proper cross-examination.")

(To which ruling of the Court, the defendants duly took an exception.)

"Q. Now, I call your attention to Government's Exhibit No. 146, which is a letter dated April 8, 1937, addressed to the Investment Finance Company. This is a copy, but bearing a signature, or a typewritten name, 'Kate Orwall Wright,' and call your attention to this part of it. I will read it in its entirety as it is short:

'In reply to your letter of March 30th, regarding the First Security Deposit Corporation stock, will you kindly advise me what the best cash market price is for this stock at the present time?'

Now, I call your attention in connection with that letter, to the further letter, Government's Exhibit 147, dated April 13, 1937, which reads as follows:

'With reference to your letter of April 8, 1937, please be advised that we can enable you to procure the sum of $619.94 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-9344.'

Now, I will ask you if upon the receipt of that letter, dated April 13, 1937, Government's Exhibit 147, that that satisfied your inquiry as to the market price.

Mr. Campbell: Objected to as incompetent and improper cross-examination.

The Court: The objection is sustained. The letter speaks for itself."

(To which ruling of the Court, the defendants duly took an exception.)

"Q. Calling your attention to Government's Exhibit No. 152, which is a carbon copy of a letter dated August 9, 1938, which is addressed to you and signed by the Investment Finance Company—this is the letter of the offer of $662.65—now in response to that letter you sold your bonds for that price, is that correct? A. Yes.

Q. And you got the money and surrendered the securities? A. I did.

Q. Now at that time did you have any information or independent knowledge of your own as to the market price of those securities?

Mr. Campbell: Objected to as incompetent, improper cross-examination.

The Court: Objection sustained."

(To which ruling of the Court, the defendants duly took an exception.)

Said witness Wright on direct examination testified that she was the owner of Certificate A-934, 11 shares of Class A Preferred stock of the face value of $220.00 and a cumulative bond A-6721 of the face value of $854.20 of the First Security Deposit Corporation; and identified Plaintiff's Exhibits 144 to 152, respectively, as letters either received by her from the Investment Finance Company or written by her, or under her instructions, to the Investment Finance Company. With respect to the offer of these letters the plaintiff stated that these letters were "offered to show that this course of relationship had been established between the company and the witness who is on the stand and which offers were made from time to time of varying amounts for her stock and certificates."

Plaintiff's Exhibit 145, a letter from the Investment Finance Company to the witness recited that the company had available funds with which to purchase First Security Deposit Corporation bonds and would pay the best cash market prices available to any who desired and that changing market conditions may affect a quotation and that the offer would remain open only for such time as the Investment Finance Company was able to meet the demands under current conditions; Plaintiff's Exhibit 146 is a letter from the witness in reply reciting:

"Will you kindly advise me what the best cash market price is for this stock at the present time."

Plaintiff's Exhibit 147 was an answer to Exhibit 146 and recited:

"Please be advised that we can enable you to procure the sum of $619.00 for the securities of the First Security Deposit Corporation bearing Nos. A-6721 and A-934."

Plaintiff's Exhibit 151, dated July 5, 1938, recites:

"We are able to this time to return to you $640.65"

for Bond No. A-6721; and Plaintiff's Exhibit 152, dated August 9, 1938, to the witness recites:

"Replying to your letter of August 6, 1938 regarding securities of the First Security Deposit Corporation, Bond No. A-6721 * * * and Certificate No. A-934 * * * we can obtain for you a total of $662.65 for the bond and preferred stock."

The witness further testified on direct examination that after she had received the above correspondence she finally sold her securities to the Investment Finance Company for $662.65.

[Assignment of Error XXIV [R. 1088-1090; Bill of Exceptions R. 433-437]:

Said District Court erred in sustaining the objections of the plaintiff to certain questions on cross-examination propounded to the Plaintiff's witness George U. Richmond. On direct examination the witness testified he was vice-president of the American National Bank of St. Joseph, Missouri. The witness was then asked on direct:

"Q. Mr. Richmond, as vice president of the bank, did you have occasion to represent Mrs. Kate Orwall Wright in a matter with reference to her securities in the First Security Deposit Corporation? A. I wrote several letters in her behalf."

The witness further testified that Plaintiff's Exhibit 153 was a letter written by him addressed to the First Security Deposit Corporation under date of July 19, 1938 reciting

that one of the customers of his bank held Bond No. A-6729 and Certificate A-934 and inquiring if she should sell the securities on the market at the present time, and "Can you tell us about what she should receive for them"; the witness further testified that Plaintiff's Exhibit 155 was a letter addressed to him from the First Security Deposit Corporation dated August 3, 1938, which said letter was a letter replying to the witness' letter under date of July 19, 1938, reciting that "we understand the market on these securities at the present time to be in the neighborhood of 75% of the face on the bonds and 10% on the stock."

The witness testified on cross-examination that he was acting for Mrs. Wright in connection with this matter; that in a sense he was her financial adviser; that he talked to her about this transaction; in answer to the question of whether he had made any independent investigation as to the matter, he said: "I wrote several letters to California banks, to Los Angeles banks."

Then the following occurred on cross-examination:

Q. You have stated here that in reference to this letter of July 19th, which is Government's Exhibit 153, that you were advising Mrs. Wright in reference to this matter, the matter of the sale of these securities? A. I said I discussed it with her. I don't know that I gave her any advice as to what to do.

Q. And you said you wrote the letters to Los Angeles banks? A. Yes, sir.

Q. Inquiring, I presume, as to the value? A. As to the market; yes.

Q. And did you get some replies on that? A. I did.

Q. Do you have any of that correspondence with you? A. I don't have it personally. It might be here. I don't know.

Q. You don't know where it is? A. We have a folder. I think perhaps it is in the hands of the Government."

The witness was asked whether he had any independent recollection as to what information he received from these banks with reference to the sale of these securities, to which the plaintiff objected on the grounds that the same was incompetent and improper cross-examination; said objection was sustained, to which ruling of the court the defendants noted an exception.

The witness was then asked after receiving those letters from the banks if he advised Mrs. Wright further with reference to the sale of these securities, to which question the plaintiff objected on the grounds that the same was incompetent and improper cross-examination; said objection was sustained, and to which ruling of the court the defendants took an exception.

The witness was asked if after receiving the letter of August 3rd, Plaintiff's Exhibit 155, that he gave Mrs. Wright any advice with reference to the contents of that letter; and objection was made that the same was immaterial and sustained by the court, to which ruling of the court an exception was noted.

[Assignment of Error XXXIV, R. 1176-1180; Bill of Exceptions, R. 604, 611, 802-807, 817-818, 916 and 922]:

Said District Court erred in permitting evidence regarding transactions between the Pierce Petroleum Corporation and the Investment Finance Company over the ob-

jections and exceptions of the defendants and each of them. Plaintiff's Exhibit 180 is a letter dated January 3, 1936 bearing the receipt stamp of the State Corporation Department of California and signed "Investment Finance Company, by J. H. Edgerton, Vice-President and C. W. Twombly, Secretary" and containing consent to the contents of the letter on behalf of the Pierce Petroleum Corporation by J. H. Edgerton, President, and C. W. Twombly, Secretary, said letter reciting that an agreement was entered into between the Pierce Petroleum Corporation and the Investment Finance Company on November 16, 1935 wherein the Pierce Petroleum Corporation agreed not to issue any stock without the consent of the Investment Finance and that certain escrow instructions were entered into; that the Investment Finance Company has been advised that the Pierce Petroleum has filed an application for the issuance of 1995 shares of stock to Boedecker, J. H. Edgerton and C. W. Twombly and that the Pierce Petroleum Corporation may consider the letter a written authorization for allowing said stock to be issued, copy of which is recited as being forwarded to the State Corporation Department.

Plaintiff's Exhibit 181 are the minutes of the annual stockholders' meeting of Pierce Petroleum Corporation held on February 19, 1937 showing stockholders present, namely, Boedecker, 100 shares, J. H. Edgerton, 200 shares, C. W. Twombly, 100 shares, Investment Finance Company by proxy, 5 shares.

"Mr. Campbell: Now reading from Plaintiff's Exhibit 42, the journal of the Investment Finance Company, reading from page 204 of such journal:

A debit item of $24,369.80, loss on Pierce Petroleum well No. 1.

'To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claim against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for $2,250 cash.'

"Mr. Campbell: The item is dated December 31, 1939, and is set forth on page 204 of Plaintiff's Exhibit 42. The following debit items:

'Suspense, $2,250. Reserve for depreciation oil well equipment, $1,844.44, unearned discount accounts purchased, $2,653.18, unearned income on service rendered, $435.18, deposit Signal Hill Water Department, $150.00. Loss on Pierce Petroleum Well No. 1, $24,369.80.'

The following credit items:

'Accounts receivable, Pierce, $2,696.27, oil well equipment, $10,000; notes receivable, Pierce, $19,006.33. To clear all accounts connected with Pierce Petroleum Lightburn Community Well No. 1 as oil well equipment and our claims against Pierce Petroleum Corporation sold to B. E. Cockril and J. O. Spelt for $2,250.00 cash. Deposit consists of $150.00 deposited with the Signal Hill Water Department by the Pierce Petroleum Corporation, which is to be withdrawn and refunded to this company on February 15, 1939, as per agreement in file.' "

The motion was made to strike the portions of the minutes read from Plaintiff's Exhibit 42, which said motion was granted by the court and the jury accordingly instructed; whereupon, over the objections and exceptions of the defendants, there was offered and received in evidence portions of the books and records of the Investment Finance Company (Plaintiff's Exhibit 39) showing loans

by the Investment Finance Company to Pierce Petroleum as follows:

"Mr. Campbell: Reading now from Plaintiff's Exhibit 39, the cash journal of the Investment Finance Company, from page 7 thereof.

'December 17, 1935.

Notes receivable—Pierce Petroleum, debit $2100; income from service rendered, credit, $435.18; unearned discount on accounts purchased, credit $2,564.82; to set up $21,000 notes receivable from Pierce Petroleum Corporation, dated 11/16/35 (with interest at 8 per cent from date) to cover indebtedness to Investment Finance Company for $15,000 cash deposited in trust #1855 with Western Trust and Savings Bank to buy claims of creditors of Pierce Petroleum Corporation $1,000 chattel mortgage L No. 24 from Charles E. and Maryan A. Kenner—$1,000 chattel mortgage L No. 23 from Pierce Petroleum Corporation on equipment—$1,000 check of Charles E. Kenner returned account insufficient funds (held in cash account in ledger)—services rendered by C. W. Twombly and J. H. Edgerton for Investment Finance Company, amount of $435.18 balance credited to Unearned Discounts on Accounts Purchased.'

The Court: Now, gentlemen of the jury, you must not connect in your minds this use of the name Kenner with the Kenner name which was in the statement made by Mr. Twombly. There is no proof here of the truth of the statement made by Mr. Twombly, and it wasn't put in, as I explained to you, for any other purpose than to show the condition of Mr. Twombly's mind from which might be indicated an intent so far as he is concerned."

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

(D) The same is incompetent and irrelevant for the reason the same has no tendency to establish the specific intent to violate the law in the manner as described in the indictment and further, that mere state of mind is immaterial to the issues raised by the indictment.

[Assignment of Error XXXV, R. 1181; Bill of Exceptions, R. 822, 856 *et seq.*, 920, and 922]:

Said District Court erred in receiving in evidence over the objections and exceptions of defendants evidence pertaining to the application of the Pacific Brick Company to sell and issue stock, and the issuance of certain shares of its common stock to certain defendants and the Investment Finance Company, and the transfer by the Investment Finance Company of certain obligations of the Pacific Brick Company to the First Security Deposit Corporation in part payment of its debt to said First Security.

Plaintiff's Exhibit 10 is an application dated May 27, 1937 addressed to the Department of Investment, Division

of Corporations of the State of California, applying for a permit authorizing it to sell and issue its stock, reciting its previous incorporation, the names of its five directors, among which were the defendants J. Howard Edgerton and E. C. Thomas, describes the property it proposes to acquire, the nature of its business is to be that of extracting clay from said property and the manufacture of bricks and other clay products, and that it seeks a permit to issue 50,000 shares of common stock of the par value of $1.00 per share and 50,000 shares of preferred stock of the par value of $1.00 per share.

Plaintiff's Exhibit 11 is an application for an amendment to permit to issue and sell securities, likewise addressed to the Division of Corporations of California, dated October 19, 1938, reciting that on October 11, 1938 a permit was issued to the Pacific Brick Company authorizing the company to issue to the persons named in its application an aggregate of not to exceed 10,000 of its common shares and further reciting that the Investment Finance Company was not named in the original application as a person or corporation to which applicant proposed to sell its shares, and requesting that the permit be amended to include the Investment Finance Company. The plaintiff was further permitted to show that the books and records of the Pacific Brick Company reflected that on the 20th day of August, 1937, 500 shares of its common stock was issued to defendant E. C. Thomas and 1410 shares to the defendant R. W. Starr. That the books and records of the Investment Finance Company disclosed that as of the 28th day of July, 1938 it had acquired 16,106 shares of the Pacific Brick Company for a consideration of $13,313.49, that as of August 5, 1938,

it had acquired 5000 shares for a consideration of $5,000.00.

The witness Bruce was permitted to testify that the Investment Finance Company transferred obligations of the Pacific Brick Company in the sum of $38,415.33 to the First Security Deposit Corporation as part of the assets transferred in retirement of its obligation of $240,465.80 to said First Security.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXVI, R. 1184; Bill of Exceptions, R. 856 *et seq.*]:

Said District Court erred in permitting evidence to be received concerning the loan of moneys by the Investment Finance Company to the Bond 17 Dog Food Company and the purchase of the common stock of said Dog Food Company by said Investment Finance Company, over the objections and exceptions of the defendants and each of them. And in permitting the plaintiff's witness Bruce to

testify over the objections and exceptions of the defendants and each of them that the Investment Finance Company transferred to the First Security Deposit Corporation as part of the retirement of its obligation to the First Security obligations of the Bond 17 Dog Food Company.

The witness Bruce testified that as of August 31, 1940, the books of the Investment Finance Company reflected that there was an obligation to the First Security Deposit Corporation of a note payable in the amount of $240,-465.80; that said obligation was retired as of that date by the transfer of assets of the Investment Finance to the First Security. Said witness was permitted to testify that included in these assets transferred to the First Security were obligations of the Bond 17 Dog Food Company in the amount of $111,018.81 to the Investment Finance. The court permitted the evidence showing that between the period of February 1, 1938 and January 24, 1939 the Investment Finance Company had acquired 89,042 shares of the Bond 17 Dog Food Company at the price of $45,-826.17; and that between the dates of May 10, 1938 and April 24, 1939 had loaned to the Bond 17 Dog Food Company at various dates sundry sums of money aggregating $63,800.00 upon which sundry repayments in the amount of $22,000.00 had been made leaving a balance of $41,-800.00 which was transferred to a Notes Receivable account of the Investment Finance on May 1, 1939; that thereafter the Investment Finance loaned further sums during the period of May 2, 1939 and August 8, 1940, during which period no repayments were made, leaving as of August 31, 1940 an aggregate balance of Notes Receivable from said Dog Food Company of $65,150.00.

The grounds of said error in overruling said obligations of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXVII, R. 1186; Bill of Exceptions, R. 856 *et seq.,* 912 and 922]:

The District Court erred in receiving in evidence over the objections and exceptions of the defendants' evidence pertaining to the application of the American Building and Investment Company to the said Corporation Commissioner of California for a permit to issue shares reflecting that the principal purpose of said corporation was investment in real estate loans, business investments and financing of a general insurance agency; that on August 12, 1938 the Investment Finance Company subscribed for and bought 17,000 shares of the 25,000 shares originally issued by said American Building and Investment Company, paying therefor the consideration of $17,000. Said Investment Finance Company transferred to the First Security Deposit Corporation in connection with the retirement of its obligation to said First Security on August 31,

1940 obligations of the American Building and Investment Company to it in the sum of $19,339.74.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXVIII, R. 1187; Bill of Exceptions, R. 374-375, 856, 912 and 922]:

Said District Court erred in admitting in evidence over the objections and exceptions of the defendants the testimony of the plaintiff's witness Bruce that as of August 31, 1940 the books of the Investment Finance Company reflected that the obligation of the Investment Finance Company to the First Security in notes payable in the amount of $240,465.80 as of August 31, 1940 was retired in part by the transfer to said First Security of 23,646 shares of the common stock of the American National Bank of Santa Monica.

The grounds of said error in overruling said objections of the defendants were and are the grounds of the objections thereto, as follows:

(A) That same was immaterial and not pertinent to any issue tendered by the indictment in that:

1. The completed offense charged in the indictment is the advancing of money or property to the Investment Finance Company.

2. There is no evidentiary value in so far as the scheme itself is alleged in the indictment.

(B) Relates to collateral, matters and agreements not related to the scheme charged.

(C) Relates to separate, distinct and isolated ventures.

[Assignment of Error XXXIX, R. 1189; Bill of Exceptions 899 *et seq.*]:

Said District Court erred in each instance in denying the written motions of the defendant Edgerton, to strike and/or exclude from the consideration of the jury certain exhibits and testimony made at the conclusion of the plaintiff's case and renewed at the conclusion of all of the evidence in the case. The grounds of said errors in denying said motions to strike were and are the grounds set forth in said written motion which said written motion is set forth in full in the Bill of Exceptions and by reference is incorporated herein as though fully set forth.